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IN THE

Supreme Court of the United States

October Term, 1967

No. 756

CHESTER W. WEGER, *Petitioner,*

vs.

PEOPLE OF THE STATE OF CALIFORNIA.

Petition for a Writ of Certiorari to the District Court of Appeal, Second Appellate District, State of California.

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IN THE

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October Term, 1967

No. .....

CHESTER W. WEGER, *Petitioner,*

vs.

PEOPLE OF THE STATE OF CALIFORNIA.

Petition for a Writ of Certiorari to the District Court of Appeal, Second Appellate District, State of California.

Petitioner Chester Weger prays that a writ of certiorari issue to review the judgment of the District Court of Appeal, Second Appellate District, State of California, entered on June 5, 1967. Said judgment, one justice dissenting, held California Penal Code Section 647(e) to be constitutional and thereby reversed the holdings of the Appellate Department of the Superior Court and the Municipal Court of the Pasadena Judicial District, both of which courts held said section to be unconstitutional. California Penal Code Section 647(e) provides as follows:

> "Every person who commits any of the following acts shall be guilty of disorderly conduct, a misdeameanor: . . . (e) Who loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer so to do, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification."

Opinions Below.

The Opinion of the Court of Appeal [C. T. 1][1] is reported in 251 A.C.A. 663. A copy of said Opinion is attached hereto as Appendix "A".

The Opinion of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles is unreported. A copy of the said Opinion [C. T. 10] is attached hereto as Appendix "B".

The Municipal Court of Los Angeles County, Pasadena Judicial District, rendered no written opinion. A copy of the Transcript Docket and the ruling of the Municipal Court are contained in the Clerk's Transcript [C. T. 4 and 5].

Jurisdiction.

1. The date of the judgment sought to be reviewed and the time of its entry is June 5, 1967 [Appx. A; C. T. 1]. In accordance with the custom of the appellate courts of California, the judgment of the court is contained in the last sentence of the Opinion (Appx. A, pp. 25 and 28).

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[1]The reference "C. T." is to the transcript of that portion of the record prepared and certified by the Clerk of the Court of Appeal, below. Said record contains, *inter alia,* portions of the record on appeal from the trial court and the record of the Court of Appeal of the State of California. The record was prepared without pagination and therefore the various documents therein have been identified by numbers "1" through "9" for convenience and are referred to accordingly. That portion of the record prepared and certified by the Clerk of the Appellate Department of the Superior Court consists of the Memorandum Opinion and Judgment and Order certifying case to Court of Appeal and are respectively identified by numbers C. T. "10" and "11". That portion of the record prepared and certified by the Clerk of the Municipal Court of the Pasadena Judicial District consists of the Demurrer and Points and Authorities and Defendant's Reply Brief to Opposition Brief of City Prosecutor, and are identified as numbers C. T. "12" and "13" respectively.

2. No rehearing was sought in the court below. A timely filed petition for hearing in the California Supreme Court was denied on July 26, 1967. A copy of the order of denial [C. T. 8] is attached hereto as Appendix "C". No extension of time was sought in this Court in which to petition for a writ of certiorari.

3. The statutory provisions believed to confer on this Court jurisdiction to review the judgment in question by a writ of certiorari are 28 U.S.C. 1257(3) and 2101(c) and Rule 22(1) of the Rules of this Court.

Question Before the Court.

Does Penal Code Section 647(e), quoted above at page 1, violate, on its face or as applied by the court below, the:

1. Right against self-incrimination as guaranteed by the Fifth Amendment and made applicable to the States by the Fourteenth Amendment to the Constitution;

2. The Due Process Clause of the Fourteenth Amendment to the Constitution of the United States because of vagueness and for the further reason that it places upon the citizen the burden of proving his innocence;

3. The right of privacy, including the right to silence, as guaranteed by the totality of the First, Third, Fourth, Fifth and Ninth Amendments to the Constitution of the United States and made applicable to the States by the Fourteenth Amendment to the Constitution of the United States

4. The right to counsel as guaranteed by the Sixth Amendment and made applicable to the States by the Fourteenth Amendment to the Constitution of the United States.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First, Fourth, Fifth Sixth, Ninth and Fourteenth Amendments to the Constitution of the United States and the pertinent provisions of California Penal Code Section 647(e) (effective 1961, Cal. Stats. 1961, c. 560, p. 1672) are set forth in Appendix "D", attached hereto.

Statement of the Case.

There are no factual issues before the Court. The sole question is the constitutionality of California Penal Code Section 647(e).

How Federal Questions Are Presented.

The complaint was filed against petitioner in the Municipal Court of Pasadena Judicial District, County of Los Angeles, State of California on June 13, 1966 [C. T. 3]. Thereafter, petitioner (then defendant) filed a demurrer to the complaint contending that the subject section denied to petitioner his right against self-incrimination, his right to be represented by counsel, and due process of law, all as guaranteed by the Constitutions of the United States and the State of California [C. T. 12]. In addition, petitioner (then defendant) filed in the Municipal Court proceedings a reply brief in opposition to the brief of the City Prosecutor opposing the demurrer. Therein, in addition to the constitutional grounds described in the demurrer, petitioner contended that 647(e) violated his basic constitutional right of privacy [C. T. 13]. The demurrer of petitioner was sustained by the judge of the Municipal Court, but no opinion was written [C. T. 4 and 5].

The opinion of the Appellate Department of the Superior Court held 647(e) to be unconstitutional as it violated the Fourth and Fifth Amendments to the Constitution of the United States (Appx. B). The opinion of the court below found the subject section to be constitutional and reached its decision solely by an examination of constitutional issues [C. T. 1 and Appx. A].

REASONS FOR GRANTING THE WRIT AND ARGUMENT AMPLIFYING SAME.

1. This court has already indicated the constitutional gravity of the issues presented by California Penal Code Section 647(e) by the granting of certiorari in four cases which are presently pending before this Court this term, all of which present similar issues: *Peters v. New York,* No. 74, *Sibron v. New York,* No. 63, *Terry v. Ohio,* No. 67 and *Wainwright v. City of New Orleans,* No. 13. *Peters, Sibron* and *Terry* are concerned with the constitutionality of "stop and frisk" statutes. *Wainwright* is remarkably similar to the case at bar. 647(e), however, goes far beyond the aforementioned four cases in that the citizen must affirmatively "account for his presence" after he is detained initially or be convicted of a crime.

Moreover, the subject case is basically a vagrancy case. While 647(e) does not carry a vagrancy label (as does the arrest in *Wainwright*) it is nothing more than a sophisticated version of that very concept. When stripped of its niceties, 647(e) permits an arrest and conviction when the citizen is doing no wrong. See *Douglas, Vagrancy and Arrest on Suspicion,* 70 Yale L.J. 1 (1960).

The same reasons which persuaded this court to grant certiorari in the aforementioned four cases also justify this court's granting the petition here. Additionally, this case is even more egregious than any of the aforementioned four as it makes one a criminal for not affirmatively satisfying the police officer that his "presence" is "accounted for". For that and that alone, says 647(e), may he go to jail.

2. California Penal Code Section 647(e) violates the self-incrimination clause of the Fifth Amendment to the Constitution of the United States. The subject section compels the citizen to "account for his presence" and thereby make a substantive statement concerning his activities of a potentially incriminatory nature, or, in the alternative, be convicted of a crime. The crime for which he could be convicted is that of refusing to respond or, in effect, silence. Such a law violates the Fifth Amendment to the Constitution of the United States in that it results in compulsory self-incrimination. *Malloy v. Hogan,* 378 U.S. 1; *Miranda v. Arizona,* 384 U.S. 436; *Escobedo v. Illinois,* 378 U.S. 478.

This "dual bind" in which the citizen finds himself when faced with 647(e) is not a situation which is new to the Courts. See *Russell v. United States,* 306 F. 2d 402 (9th Cir.) and *Albertson v. Subversive Activities Control Board,* 382 U.S. 70. In both cases, the subject law compelled the citizen to perform an act which could result in self-incrimination; failure to comply resulted in conviction of a crime. In both cases, the balance was struck in favor of the constitutional right and the law held to be invalid. 647(e) places the individual in the *Albertson-Russell* type position of hav-

ing a 'choice between the rock and the whirlpool," does not give him a free choice to "admit, deny or refuse to answer" and is therefore unconstitutional (*Garrity v. State of New Jersey,* 385 U.S. 493).

This Court has held in *Griffin v. California,* 380 U.S. 609 and *Chapman v. California,* 386 U.S. 18 that comment upon a defendant's silence before a jury eroded the prohibition against self-incrimination and was therefore unconstitutional. *A fortiori,* that same silence cannot itself be made into a criminal act.

The concurring opinion in the court of appeal below holds that Fifth Amendment protection is not afforded the citizen unless he affirmatively invokes the amendment—that mere silence (which is the very thing the amendment protects) is not sufficient [Appx. A. p. 28 and C. T. 1, p. 36]. What this appears to mean is that a person who can incant the magic words is not a criminal, but that the citizen who goes to the very substance of the matter—namely, remaining silent—goes to jail. This serves only to penalize the ignorant and reward the worldly. While we cannot believe this to be the law, at a minimum, the manner in which the Fifth Amendment must be claimed by a citizen outside the courtroom is of sufficient magnitude that it warrants examination and consideration by this Court.

The subject section cannot be reconciled with the holdings of *Miranda v. Arizona,* cited *supra.* (See also *Spevack v. Klein,* 385. U.S. 511 and *Garrity v. New Jersey,* cited *supra.*) 647(e) requires the individual to provide the officer with identification and an explanation for his presence under certain circumstances. It is quite clear that the circumstances relate almost exclusively to the apprehension and punishment of criminals.

See *People v. Bruno,* 211 Cal. App. 2d Supp. 855. At the very moment the statute gives the law enforcement officer the right to compel the individual to account for his presence, the matrix of the situation would appear to include likelihood of commission of a crime and belief that the person being questioned is connected with that crime. The principles of *Miranda* would therefore require that the detainee be apprised of his constitutional rights, including the right to silence and to counsel. It would also appear that the *Miranda*-type warnings are mandatory as, by the very language of 647(e), the defendant must respond to the officer's inquiry and he is therefore in a state of "custodial interrogation". His freedom of action is significantly restrained in that he must answer the officer's questions at the specific location and moment when demand is made upon him. See *Miranda v. Arizona,* 384 U.S. at 478. The substance of the situation is to have the officer explain to the citizen his right to silence and counsel; should the citizen then assert these rights, he would be arrested by the very same officer for utilizing the constitutional guarantees just explained to him. *Miranda* is quite clear that "the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." 384 U.S. at 467. 647(e) does not "fully honor" these rights.

The opinion of the court concludes that silence is "not assertive conduct" in a 647(e)-type situation and is therefore not protected by the Fifth Amendment [Appx. A, pp. 19-21 and C. T. 1, pp. 25-27]. However, 647-(e) requires the individual to "identify himself and account for his presence," which seeks content. The fact that content itself is sought is evidenced by the very

definition relied upon by the court below [Appx. A, p. 11 and C.T. 1, p. 14], wherein it defines "account for" to mean: "to furnish substantial reasons or a convincing explanation; make clear or reveal basic causes." If this be so, it demonstrates that 647(e) is precisely aimed at the content of speech and is, in fact, unequivocally testimonial compulsion and is therefore within the realm of Fifth Amendment protection.

A second ground relied upon by the court in concluding that silence is not testimonial compulsion is that the officers making inquiry pursuant to 647(e) would not know *what* crime, if any, had been committed and therefore the questions would not be intended to elicit incriminating statements, but only to afford the defendant an opportunity to explain his presence and actions [Appx. A, pp. 21-24 and C. T. 1, pp. 27-30]. This type of compulsory opportunity or benefit has, it is submitted been rejected by this Court. *Miranda v. Arizona,* 384 U.S. at 482. See also: *People v. Ridley,* 63 Cal. 2d 671, and *What Is "Custodial Interrogation"?: California's Anticipatory Application of Miranda v. Arizona,* Graham, 14 U.C.L.A. L. Rev. 59, 126-9 (1966). Such reasoning results in the citizen being given an "opportunity" and then punished criminally if he fails to take advantage of that "opportunity".

3. California Penal Code Section 647(e) violates the basic constitutional right of privacy and protection from unreasonable intrusion into the activities and thoughts of the citizen by the State or its representatives. *Griswold v. Connecticut,* 381 U.S. 479. Section 647(e) denies this right to the individual in that it requires him to reveal to law enforcement officers a detailed description of his activities of the moment. This explana-

tion must be given by the individual though he be totally free of criminal involvement. Further, the section applies to *all* in that the words "loiters" and "wanders" as used in 647(e) have now, for the first time, been construed in an unrestricted manner so that they need no longer relate to criminal activity or involvement [Appx. A, p. 8 and C. T. 1, p. 11]. (This is further evidenced by the language of 647(e) itself, wherein it provides: "*Every* person . . ." [emphasis added]). Further, as now construed, 647(e) would require the California citizen to carry with him at all times and to display upon request, identification papers. The opinion of the court below appears to construe the word "identify" as requiring that the individual present written documentation of his identity to the law enforcement officer [Appx. A, p. 10 and C T. 1, pp. 13 and 14, wherein the word "identify" is defined by dictionary definitions to mean, *inter alia,* to "establish as being a particular person or thing; attest or prove to be as purported or asserted." "Proof that a person or thing is the person or thing [he or] it is supposed or represented to be."] The requirement that all citizens upon the street have with them at all times identification papers is foreign to this system of government and exists only in an aura of totalitarianism. It unconstitutionally invades the right of privacy of the individual.

This petition affords this Court an opportunity to decide an additional question upon which it has never ruled, but should. What is at issue is the effect of a statute which interferes with the constitutionally protected right of privacy and to be let alone. The opinion of the court of appeal below approaches the problem

of constitutionality of 647(e) with "a presumption in favor of constitutionality . . ." [Appx. A, pp. 2 and 3 and C. T. 1, p. 3]. This Court should determine whether the right of privacy is of sufficient constitutional import that the usual presumption in favor of constitutionality should not be applied, but instead, the rules applicable to First Amendment rights control, *i.e.*, where a First Amendment right is impinged, such a statute comes to the court "bearing a heavy presumption *against* its constitutional validity." *Freedman v. Maryland,* 380 U.S. 51, 57 (emphasis added) and *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58. See also: *Camara v. Municipal Court,* 387 U.S. 523 for a recent expression of this Court's concern for the right of privacy. It is submitted that the right of privacy is of no less magnitude than freedom of speech or political belief and should not be treated differently (*cf. Griswold v. Connecticut, supra*).

The subject section, as construed by the court below, changes our entire concept of the relationship between the state and the individual. Such an intrusion into the personal life of a citizen to this extent should not be permitted in the law at least without first being critically examined by this Court.

4. Penal Code Section 647(e) denies to the individual his right to counsel as guaranteed by the Sixth Amendment to the Constitution of the United States. The section requires the interrogated party to identify himself and to account for his presence "*when requested* by any peace officer" (emphasis added). This necessity for an immediate response obviously precludes the individual from having counsel present during the interrogation or, for that matter, even consult-

ing with counsel concerning the wisdom of responding to the officer's inquiry. A law preventing an individual from consulting with an attorney, particularly when he is suspected of criminal activity, violates the thrust of this Court's decisions in *Gideon v. Wainwright,* 372 U.S. 335, *Miranda v. Arizona, supra, United States v. Wade,* 388 U.S. 218, and *Gilbert v. California,* 388 U.S. 263.

647(e) presents an even more compelling case for the Sixth Amendment guarantee of the right to counsel than the cases just citied. In *Gideon, Gilbert* and *Wade,* evidence obtained without the benefit of counsel was excluded. In 647(e)-type cases, the defendant is guilty of a crime, *per se,* should he refuse to answer the officer's questions, even though his reason for refusing may be that he desires to first consult with counsel. The section is totally inconsistent with the dictates of the Sixth Amendment.

5. 647(e) violates the due process clause of the Fourteenth Amendment to the Constitution of the United States in that it is unconstitutionally vague.

The phrase "to identify himself" in the context of the statute at bar fails to meet the constitutional requirement of definiteness. What does a citizen have to do to satisfy this clause? Is it sufficient if he states his name, or must he also provide his residential address or perhaps even his place of employment? Is oral identification sufficient or must he also produce written document or identification papers (and may he be detained if, like many of us, such papers are not in his possession at the particular moment?) It is not the contention of petitioner that the word "identify" does not exist or that under certain circumstances it cannot be

definite for certain purposes. He does say that in this criminal statute—when *the* crime is failure to identify—the standard is not sufficiently specific to meet constitutional standards. Certainly the matter cannot be left to the determination of the police. *Cox v. Louisiana,* 379 U.S. 536, 579 (Opinion of Mr. Justice Black). If the individual must be convicted of the crime of failing to identify himself, he should at least be apprised of the specific information which must be presented. *United States v. Cardiff,* 344 U.S. 174 and *Lanzetta v. New Jersey,* 306 U.S. 451.

The unmodified words "to account for his presence" provide the citizen with no guidance as to the nature or extent of information which must be provided and are therefore unconstitutional. *United States v. Margeson,* 259 F. Supp. 256, 268-269 (Ed. Pa. 1966) (holding "good account" to be unconstitutionally vague). If the detainee says, "I'm taking a walk," or "I'm resting," has he accounted for his presence? If not, what more must he say in order not to be a criminal under this part of the statute? How far back in point of time must he relate his activities? Who is to judge as to whether he has "accounted" for his presence? Such a standard is unconstitutionally vague. *City of Seattle v. Drew,* .... Wash. 2d ...., 423 P. 2d 522 (1967). The questions raised by the construction to be placed upon the words in the section are not mere academic challenges, but as worded, 647(e) is truly an invitation to trouble. This is particularly true when it is realized that the type of individual who is most likely to be confronted by the demand of the law enforcement officer to account for his presence is one who is poor, from a minority group, or a non-conform-

ist. See 22 *California Assembly Interim Report No. 1,* page 15 (1961).

This final phrase of the statute at bar "if the surrounding circumstances are such as to indicate to a reasonable man that public safety demands such identification", provides the citizen with no guidance as to the fact situation which must exist before he is legally obligated to advise the officer of his identity and to account for his presence. The phrase does not require the *citizen* to know what the "surrounding circumstances" are so that he may guide himself away from criminal conduct by responding. The statute, although couched in terms of "a reasonable man," presumably controls how the officer must act, but, again, it leaves it to him to judge whether the citizen must respond. The citizen must know if the "surrounding circumstances" are such that the response is necessary if he is to escape criminal responsibility. Facts, however, may be known to the law enforcement officer, which would justify his inquiry, but he is under no duty to impart this information to the citizen. The citizen has only his visible surroundings before him and not the subjective information possessed by the officer. Such a law can only lead to the creation and not deterrence of criminals. Our government is one of "clearly defined laws," rather than government by the moment-to-moment opinions of a policeman on his beat. *Cox v. Lousiana,* cited *supra.*

The construction by the court below of the words "loiter" and "wander" is unconstitutionally vague. Previously, the California courts have upheld the constitutionality of the word "loiter" in criminal statutes by construing it narrowly so that it related to criminal

activity or intent. *In re Cregler,* 56 Cal. 2d 308; 363 P. 2d 305 and *In re Huddleston,* 229 Cal. App. 2d 618, 40 Cal. Rptr. 581. The opinion of the court below [Appx. A, p. 8 and C. T. 1, p. 11], has for the first time, construed the word "loiter" (and "wander") in such a manner that it bears no relationship whatsoever to criminal activity but applies to one who "linger(s) aimlessly or as if aimlessly in or about a place: . . . to move in a slow, idle manner; make purposeless stops in the course of a trip, journey, errand, etc." [Appx. A, p. 7 and C. T. 1, pp. 9 and 10]. As California now construes "loiter", it applies to every person in a public place. Such an interpretation now makes the mere walking upon the street an element of a crime. For that reason alone, the statute should be held invalid. *Territory of Hawaii v. Anduha,* 48 F. 2d 171 (C.G.A. 9, 1931). To hold otherwise would be to sanction the prosecution of wholly non-criminal conduct. See *Thompson v. Louisville,* 362 U.S. 199, *Garner v. Louisiana,* 368 U.S. 157, and *Fields v. Fairfield,* 375 U.S. 248.

Penal Code Section 647(e) is also violative of due process of law under *Speiser v. Randall,* 357 U.S. 513.

By the very terminology of the section, the circumstances are "suspicious". Whether the interrogation of the detainee has reached the accusatory stage or is still in the investigative phase, it cannot be gainsaid that both the statute and the police by interrogating under it place the burden upon the citizen of "clearing" himself. If he accepts the opportunity so presented, and the officers are satisfied, that is the end of the matter. (We leave aside consideration of the situation wherein the citizen's accounting is not satisfactory to

the police and he has incriminated himself as to another crime.) If, however, he does not accept the opportunity and is silent, *for not coming forward to overcome the suspicious circumstances*—for not shouldering the burden of proving innocent—the statute imposes criminal sanctions.

This is precisely the evil at which this Court struck in *Speiser*. There, a veteran who, or church which, would not sign a statement that he or it did not advocate the overthrow of the government by force or violence or other unlawful means nor advocated the support of a foreign government in the event of hostilities, was imposed with the sanction of loss of tax exemption. This Court held that this violated due process because it placed the burden of proof upon the citizen. The state had taken the position that the tax exemption was a privilege and that to obtain it the taxpayer had the burden of proving his entitlement. In striking down the requirement, this Court recognized that the statement was concerned with matters which could be criminal. It quoted (pp. 523-524) from criminal cases (*e.g., McFarland v. American Sugar Refining Co.*, 241 U.S. 79, 86; *Tot v. United States*, 319 U.S. 463, 469; *Morrison v. California*, 291 U.S. 82, 88) to the effect that the State cannot put on the defendant the burden of proving his innocence, and also from civil cases (at p. 524) which struck down statutes which unfairly shifted the burden of proof.

The statute at bar is subject to that precise disability. True, *Speiser* arose in a free speech context, while the present case arises in a right of privacy context. But the constitutional rights involved are not dissimilar. (*Cf. Time, Inc. v. Hill*, 385 U.S. 374). If, by

silence, the citizen does not come forward under the circumstances, set forth in 647(e) and clear himself, he is guilty of a crime. As *Speiser* demonstrates, the due process clause will not tolerate such a statute.

Conclusion.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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Attorneys for Petitioner.

APPENDIX A.

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division Two.

People of the State of California, Plaintiff and Appellant, v. Chester W. Weger, Defendant and Respondent. 2d Cr. No. 13090.

Filed: June 5, 1967.

APPEAL from orders of Municipal Court, Pasadena Judicial District, sustaining demurrer to complaint and dismissing action. Louis T. Fletcher, Judge. Reversed.

Byron B. Gentry, City Prosecutor (City of Pasadena) and David Press, Assistant City Prosecutor, for Plaintiff and Appellant.

Thomas C. Lynch, Attorney General, William E. James, Assistant Attorney General; Evelle J. Younger, District Attorney (Los Angeles), Harry Wood, Chief, Appellate Division, Harry B. Sondheim, Deputy District Attorney; Roger Arnebergh, City Attorney, Philip E. Grey, Assistant City Attorney and Melvin L. Jensen, Deputy City Attorney, as Amici Curiae on behalf of Appellant.

Allen I. Neiman, A. L. Wirin, Fred Okrand and Laurence R. Sperber, for Respondent.

In June 1966 the People filed a complaint in the Municipal Court for the Pasadena Judicial District, charging defendant with a violation of subdivision (e) of section 647 of the Penal Code. The trial court sustained defendant's demurrer and ordered the case dismissed. (Penal Code, § 1008.) On appeal by the People the Appellate Department of the Superior Court for

Los Angeles County affirmed the judgment of dismissal and certified the case to this court. We ordered the case transferred in order to settle an important question of law.

The only question before us is the constitutionality of section 647, subdivision (e), of the Penal Code. That section provides in relevant part: "Every person who commits any of the following acts shall be guilty of disorderly conduct, a misdemeanor: . . . (e) Who loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer so to do, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification."[1] We are not concerned with the guilt or innocence of defendant. We hold that the law is constitutional and that the judgment dismissing the action must be reversed.

We note at the outset that there is "a presumption in favor of constitutionality, and the invalidity of a legislative act must be clear before it can be declared unconstitutional." (*Patton v. La Bree,* 60 Cal. 2d 606, 608-609.) "As pointed out in *People v. Superior Court* (1937), 10 Cal.2d 288, 298 [4] [73 P.2d 1221], 'Judicial decisions abound with declarations to the effect that all presumptions and intendments favor the validity of statutes; that mere doubt by the judicial branch of

[1]Section 647 was adopted in 1961. (Stats. 1961, ch. 560.) Subdivision (e) of this section was considered in *People v. Bruno,* 211 Cal.App.2d Supp. 855, and in *People v. Wilson,* 238 Cal.App.2d 447, and was noted in *People v. Kraps,* 238 Cal.App.2d 675. However, neither of these cases deal with the constitutionality of the section.

the government as to the validity of a statute will not afford a sufficient reason for a judicial declaration of its invalidity. . . .' [Citations.]" (*In re Cregler,* 56 Cal.2d 308, 311.) "Statutes are to be so construed, if their language permits, as to render them valid and constitutional rather than invalid and unconstitutional. (*County of Los Angeles v. Legg,* 5 Cal.2d 349, 353 [55 P.2d 206]; 45 Cal.Jur.2d, Statutes, § 115, p. 624.)" (*Erlich v. Municipal Court,* 55 Cal. 553, 558.) "Statutes must be upheld unless their unconstitutionality clearly, positively and unmistakably appears." (*In re Huddleson,* 229 Cal.App.2d 618, 621.)

Section 647, subdivision (e) is not Constitutionally Vague and Uncertain

Defendant contends that section 647, subdivision (e), of the Penal Code, is vague and uncertain and fails to establish clearly defined standards of guilt and thus deprives him and all others of due process of law. In our opinion this contention is not tenable.

The Supreme Court of the United States "has consistently held that lack of precision is not itself offensive to the requirements of due process. '. . . [T]he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . .' United States v Petrillo, 332 US 1, 7, 8, 91 L ed 1877, 1883, 67 S Ct 1538." (*Roth v. United States,* 354 U.S. 476, 491, 1 L. Ed.2d 1498, 1510-1511.) "A criminal statute must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties, and to guide the judge in its ap-

plication and the lawyer in defending one charged with its violation. But few words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded." (*Boyce Motor Lines v. United States* (1952) 342 U.S. 337, 96 L. Ed. 367, 371.)

Similarly it has been held in this state that "The requirement of a reasonable degree of certainty in legislation, especially in the criminal law, is a well established element of the guarantee of due process of law. 'No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids . . . "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." ' (*Lanzetta v. New Jersey,* 306 U.S. 451, 453 [59 S.Ct. 618, 83 L. Ed. 888]; see also *Connally v. General Const. Co.,* 269 U.S. 385, 391 [48 S.Ct. 126, 70 L. Ed. 322].) Such also is the law of the State of California. (*People v. McCaughan,* 49 Cal.2d 409, 414 [317 P.2d 974].)" (*In re Newbern,* 53 Cal.2d 786, 792.)

In *In re De La O,* 59 Cal.2d 128, 153, it is said: "Words used in a statute are ordinarily to be construed according to the context and 'the approved use of the language' (Civ. Code, § 13), and 'a statute is sufficiently certain if it employs words of long usage or

with a common law meaning, "notwithstanding an element of degree in the definition as to which estimates might differ" ' (*Lorenson v. Superior Court* (1950) 35 Cal.2d 49, 60 [8] [216 P.2d 859].)" In *People v. Victor,* 62 Cal.2d 280, 298, the court adhered to these rules, adding at page 299 that admittedly a word as used in a particular statute may be "a relevant one; but 'the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree.' (*Nash v. United States* (1913) 229 U.S. 373, 377 [33 S. Ct. 780, 57 L. Ed. 1232].)"

In short, the presence of an element of degree in the definition of the words used "does not of itself render the statutory language insufficiently certain to comply with due process. ' "Reasonable certainty is all that is required. A statute will not be held void for uncertainty if any reasonable and practical construction can be given its language." [Citation.] It will be upheld if its terms may be made reasonably certain by reference to other definable sources.' (*American Civil Liberties Union v. Board of Education* (1963), 59 Cal.2d 203, 218 [9] [28 Cal.Rptr. 700, 379 P.2d 4].)" (*People v. Victor,* 62 Cal.2d 280, 300.) "The complexities of the social problems dealt with by the Legislature require that a practical construction be given to the language employed by the draftsmen of legislation lest their purposes be too easily nullified by overrefined inquiries into the meaning of words." (*People v. Vaughn,* 196 Cal. App.2d 622, 632.)

We turn now to a consideration of the words used in the statute. In doing so we are required "to read the statute in the light of the objective sought to be

achieved by it as well as the evil sought to be averted. (*Wotton v. Bush* (1953) 41 Cal.2d 460, 467 [261 P.2d 256].)" (*In re Huddleson*, 229 Cal.App.2d 618, 624.) "Where the words have a broad and also a restricted meaning, if the apparent object of the statute will be subserved by construing them in their restricted sense, whereas a principal object would be defeated by construing them in their broad sense, the restricted interpretation will be preferred and the broad meaning rejected, though the latter may be the more usual meaning. But a narrow or restricted meaning should not be given a word if it would result in evasion of the evident purpose of the act, or if a broader meaning would prevent evasion and carry out the purpose." (45 Cal.Jur. 2d, Statutes, § 140, p. 648.)

In 1961 the Legislature, after a lengthy study of the problems involved (see 22 Assembly Interim Committee Reports, No. 1 (1961)) repealed former section 647 of the Penal Code and adopted section 647 in its present form. (Stats. 1961, ch. 560.) Former section 647 classified the crime of "vagrancy" as a misdemeanor.[2]

In repealing former section 647 and enacting the present section, the Legislature recognized, as urged by

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[2]Former § 647 declared that, among others, "3. Every person who roams about from place to place without any lawful business; or 4. Every person known to be a pickpocket, thief, burglar or confidence operator, either by his own confession, or by his having been convicted of any such offenses, and having no visible or lawful means of support, when found loitering around any steamboat landing, railroad depot, banking institution, broker's office, place of amusement, auction room, store, shop or crowded thoroughfare, car, or omnibus, or any public gathering or assembly; or, . . . 6. Every person who wanders about the streets at late or unusual hours of the night, without any visible or lawful business; . . . [i]s a vagrant. . . ."

the principal draftsman of the new section, that the time had come to abandon the vagrancy concept of the former section "for statutes which will harmonize with notions of a decent, fair and just administration of criminal justice and which will at the same time make it possible for police departments to discharge their responsibilities in a straightforward manner . . ." In Professor Sherry's words, this was done "by drafting legislation which will describe the acts to be proscribed with precision and which will be free of the hazy pneumbra of medieval ideas of social control characteristic of existing law." (Sherry, *Vagrants, Rogues and Vagabonds—Old Concepts in Need of Revision,* 48 Cal. L. Rev. 557, 567 (Oct. 1960); and see 22 Assembly Interim Committee Reports No. 1 (1961) pp. 7-19; *People v. Bruno,* 211 Cal.App.2d Supp. 855, 859-860.)

"The word 'loiter' has been defined to mean 'to be slow in moving; delay; linger; saunter; lag behind' (Webster's New International Dictionary (2nd ed.); see *State v. Starr* (1941) 57 Ariz. 270 [113 P.2d 356, 357]) or 'to linger idly by the way, to idle' (*Phillips v. Municipal Court* (1938) 24 Cal.App.2d 453, 455 [75 P.2d 548])." (*In re Huddleson,* 229 Cal.App.2d 618, 621-622.) In The Random House Dictionary of the English Language (unabr. ed. 1966) "loiter is defined as "1. to linger aimlessly or as if aimlessly in or about a place: . . . 2. to move in a slow, idle manner; make purposeless stops in the course of a trip, journey, errand, etc." "While taken by itself and in its broad meaning the term may carry no criminal implications, nevertheless as employed in a penal statute and considered in such statutory context, it may have a sinister, wrongful or criminal import. [Citations.]" (*In re Huddleson, supra,* p. 622.)

Over the years the courts have considered and upheld the constitutionality of various statutes proscribing "loitering" in one context or another. (See, e. g., *Phillips v. Municipal Court* (1938) 24 Cal.App.2d 453; *Wright v. Munro* (1956) 144 Cal.App.2d 843; *Garcia v. Munro* (1958) 161 Cal.App.2d 425; see also *Flores v. Los Angeles Turf Club* (1961) 55 Cal.2d 736.) In 1961 the court in *In re Cregler,* 56 Cal.2d 308, upheld the constitutionality of subdivision 4 of former section 647 of the Penal Code. It was there held that the word "loiter" as used in the subject statute and in many other police power regulations "has a sinister or wrongful as well as a reasonable definite implication. As proscribed by the statute the word 'loiter' obviously connotes lingering in the designated places for the purpose of committing a crime as opportunity may be discovered." (Pp. 311-312.) In *In re Huddleson,* 229 Cal.App.2d 618, the court followed *Cregler* in sustaining the constitutionality of section 647a, subdivision 2, which provides that "Every person who loiters about any school or public place at or near which children attend or normally congregate is a vagrant. . . ."

We are satisfied that with the passing of the "unalloyed, uncomplicated criminal character the sturdy rogue, the idle vagabond, the true vagrant," (tenBroek, *Family Law, Part III,* 17 Stanf. L. Rev. 614, 673-674), we are no longer required to give the word "loiter" a restricted meaning in order to sustain the constitutionality of the statute. As tenBroek points out, when section 647 was repealed, recast and reenacted in 1961, "The name of the offense was changed from vagrancy to disorderly conduct. . . . Mere roaming about from place to place by persons without visible means of sup-

port is no longer forbidden; one must also refuse to identify himself and to account for his presence when requested by a peace officer to do so, 'if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification.' " (P. 673.)

What we have just said about the word "loiter" applies equally to the word "wander." In its broad sense "wander" means: "1. to ramble without a definite purpose or objective; roam, rove, or stray; . . . 2. to go aimlessly, indirectly, or casually." (The Random House Dictionary of the English Language, unabr. ed. 1966.)

As now written, section 647, subdivision (e), does not make loitering and wandering upon the streets or from place to place without apparent reason or business without more a punishable offense. As there used the words do not connote unlawful activity. (*City of Seattle v. Drew,* ..... Wash.2d ....., 423 P.2d 522, 524.) They do no more than describe the person who may be asked by a peace officer to identify himself and to account for his presence in the prescribed circumstances. As so used the words "loiter" and "wander" are not so vague that men of common intelligence must necessarily guess at their meaning and differ as to their application. (*Lanzetta v. New Jersey,* 306 U.S. 451, 453; *United States v. Harriss,* 347 U.S. 612, 617.)[3]

Defendant also contends that the statute is unconstitutionally vague in that it gives the loiterer or wanderer no guidance as to what he must do "to identify

[3]We do not agree with the court in *People v. Bruno,* 211 Cal.App.2d Supp. 855, 860-861, that "wandering" as used in section 647, subdivision (e) "consists of movement for evil purposes," even in the absence of any constitutional question.

himself or to account for his presence." We do not agree.

Here, again, we may look to the commonly accepted meaning of the words. According to the American College Dictionary, "identify" means to "establish as being a particular person or thing; attest or prove to be as purported or asserted." "Identification," according to College Law Dictionary means "Proof that a person or thing is the person or thing [he or] it is supposed or represented to be."

State v. Evjue, 253 Wis. 146, 33 NW 2d 305, involved a statute which prohibited the publication of "the identity of a female who may have been raped or subjected to any similar criminal assault . . ." (P. 308.) In holding that the word "identity" as there used was not unconstitutionally vague or indefinite the court said (p. 309): "The word 'identity' is not a word of art in the law. 'Identity' is a noun and from it the adjective 'identical' is derived. Things are said to be identical when they are the same, equivalent, equal. To identify is to establish the identity of; to prove the same with something described, claimed, or asserted. Identity is defined as sameness of essential or generic character in different examples or instances; the limit approached by increasing similarity; sameness in all that constitutes the objective reality of a thing. (Webster) With respect to persons the most common means of identifying them is by name, but that is by no means the only method which is employed. Any knowledge or information which enables the recipient to distinguish

the person referred to affords a means of identification."[4]

To "account for" is defined in Webster's Third New International Dictionary as meaning: ". . . to furnish substantial reasons or a convincing explanation; make clear or reveal basic causes." In the context of section 647, subdivision (e), as we read it, to account for one's presence is, in substance, an integral part of the identification there required.[5]

While there appear to be no cases directly in point, we are satisfied that for the reasons discussed above, the phrase "to account for his presence" as used in section 647, subdivision (e), is to be given its lay meaning, and that so construed it is not constitutionally vague and indefinite. (See *Dominguez v. City and County of Denver,* ..... Colo. ....., 363 P.2d 661, and Notes, *Validity of "Satisfactory Account" Clauses In Vagrancy Ordinances* (Kalhr), 4 Ariz. L.Rev. 284.) We do not think that *United States v. Margeson,* 259 F.Supp. 256, is persuasive authority to the contrary.

More fundamentally, defendant contends that the statute is unconstitutionally vague because the crime

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[4]In *People v. Diaz,* 174 Cal.App.2d 799, 803, it was held that, in the circumstances of a case in which the disclosure of the identity of an informer was necessary to a fair trial, mere disclosure of his name without further identifying information was not enough.

[5]It seems clear to us that, as used in section 647, subdivision (e), the concluding phrase, "such identification" as the public safety demands refers back to the obligation imposed on the person of whom the request is made "to identify himself and to account for his presence."

for which he may be prosecuted is dependent on the subject discretion of the peace officer who seeks to interrogate him. In support of this contention he relies primarily on the concurring opinion of Justice Black in *Cox v. Louisiana,* 379 U.S. 559, 575, 13 L.Ed. 487, 498, where he said that a statute is unconstitutional which "does not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat." (379 U.S. at 579, 13 L.Ed.2d at 501; see also *Shuttlesworth v. Birmingham,* 282 U.S. 87, 90, 15 L.Ed.2d 176, 179.)

We do not believe that section 647, subdivision (e), can be so construed. In *Cox v. Louisiana,* 379 U.S. 536, 13 L.Ed.2d 471, the court held that the statute under which defendant had been convicted, prohibiting obstruction of public streets and passages, was unconstitutional because it vested "unfettered discretion in local officials in the regulation of the use of the streets for peaceful parades and meetings." The court said, however: "It is, of course, undisputed that appropriate, limited discretion, under properly drawn statutes or ordinances, concerning the time, place, duration, or manner of use of the streets for public assemblies may be vested in administrative officials, provided that such limited discretion is 'exercised with "uniformity of method of treatment upon the facts of each application, free from improper or inappropriate considerations and from unfair discrimination" . . . [and with] a "systematic, consistent and just order of treatment, with reference to the convenience of public use of the highways. . . ."' Cox v. New Hampshire, supra, 312 US at 576, 85 L. ed at 105, 133 ALR 1396." (379 U.S. at 558, 13 L.Ed.2d at 486.)

Section 647, subdivision (e), permits a peace officer to stop one who loiters or wanders upon the streets "without apparent reason or business," and require him to "identify himself and to account for his presence" only "if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification." In determining the constitutionality of this enactment we are required to read it in its entirety. So read, we are satisfied that it constitutionally vests appropriate, limited discretion in the peace officers of this state.

Admittedly, the provision in the original draft of the section requiring the loiterer to identify himself and account for his presence was conceived by the principal draftsman to be consistent with the authority which peace officers have long possessed in California. As Professor Sherry says in footnote 72 to his article in 48 California Law Review at page 571: "A dictum in the earliest case in which the private person's responsibility to respond to reasonable police inquiry is discussed is in point with respect to the suspicious loiterer: 'A police officer has a right to make inquiry in a proper manner of anyone upon the public streets at a late hour as to his identity and the occasion of his presence, if the surroundings are such as to indicate to a reasonable man that the public safety demands such identification.' Gisske v. Sanders, 9 Cal.App. 13, 16, 98 Pac. 43, 45 (1908). Years later, the California Supreme Court adopted this conclusion in People v. Simon, 45 Cal.2d 645, 290 P.2d 531 (1955)." Although it was held in *People v. Simon* (p. 650) that the search there involved was not reasonable in the circumstances of that case, the court was careful to point out that "There is, of course, nothing unreasonable in an officer's ques-

tioning persons outdoors at night [citations], and it is possible that in some circumstances even a refusal to answer would, in the light of other evidence, justify an arrest. (See *Gisske v. Sanders, supra,* 9 Cal.App.2d 13, 17.)" The phrase, ". . . if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification," was included in section 647, subdivision (e), as enacted in 1961 in order to make the section "fit more nearly the dictum from *Gisske v. Sanders,* upon which it is based." (22 Assembly Interim Committee Reports, No. 1, p. 18 (1961).)

In our opinion section 647, subdivision (e), confers on the peace officers of the state an appropriate limited discretion which does no violence to any constitutional provision. This discretion is analogous to the discretion vested in such officers to make an arrest in circumstances short of probable cause.

People v. Mickelson, 59 Cal.2d 448, was decided in 1963. In that case the court said (at pp. 450-451): "[W]e have consistently held that circumstances short of probable cause to make an arrest may still justify an officer's stopping pedestrians or motorists on the streets for questioning. If the circumstances warrant it, he may in self-protection request a suspect to alight from an automobile or to submit to a superficial search for concealed weapons. Should the investigation then reveal probable cause to make an arrest, the officer may arrest the suspect and conduct a reasonable incidental search." At page 452, the court said: "We do not believe that our rule permitting temporary detention for questioning conflicts with the Fourth Amendment. It strikes a balance between a person's interest in im-

munity from police interference and the community's interest in law enforcement. It wards off pressure to equate reasonable cause to investigate with reasonable cause to arrest, thus protecting the innocent from the risk of arrest when no more than reasonable investigation is justified." This rule was reiterated in *People v. One 1960 Cadillac Coupe,* 62 Cal.2d 92, 95-96.

In *People v. Cowman,* 223 Cal.App.2d 109, we held that it is constitutionally permissible for a peace officer to stop an automobile for the purpose of interrogating the occupants even when the officer had no preconceived intent either to arrest the occupants or to conduct a search of the vehicle. We there said (p. 117) that the rationale of the decisions is "that an officer of the law, employed to maintain the peace and to prevent crime, as well as to apprehend criminals after the fact, has both the right and the duty to make reasonable investigation of all suspicious activities even though the nature thereof may fall short of grounds sufficient to justify an arrest or a search of the persons or the effects of the suspects. Experienced police officers naturally develop an ability to perceive the unusual and suspicious which is of enormous value in the difficult task of protecting the security and safety of law-abiding citizens."

The same conclusion was reached in *People v. Perez,* 243 Cal.App.2d 528, where the court said at page 531: "An officer may stop a pedestrian or motorist for questioning under circumstances short of probable cause for arrest. (*People v. Mickelson,* 59 Cal.2d 448, 450 [30 Cal.Rptr. 18, 380 P.2d 658].) There must, however, be some suspicious circumstance to justify even such a limited interference with an individual's free-

dom of movement. *People v. One 1960 Cadillac Coupe,* 62 Cal.2d 92 [41 Cal.Rptr. 290, 396 P.2d 706]; *Hood v. Superior Court,* 220 Cal.App.2d 242 [33 Cal.Rptr. 782].) There is no precise formula by which it can be determined whether an officer acted lawfully in stopping a pedestrian or a motorist for questioning; the test is '. . . when the circumstances are such as would indicate to a reasonable man in a like position that such a course is necessary in the proper discharge of his duties.' (*People v. One 1960 Cadillac Coupe, supra,* pp. 95-96; *People v. Davis,* 222 Cal.App.2d 75, 78 [34 Cal.Rptr. 796]; *People v. Porter,* 196 Cal.App.2d 684, 686 [16 Cal.Rptr. 886].) The reasonableness of an officer's action depends upon the facts and circumstances of the particular case. *(People v. Alcala,* 204 Cal.App.2d 15, 20 [22 Cal.Rptr. 31]; cf. *People v. Ingle,* 53 Cal.2d 407, 412 [2 Cal.Rptr. 14, 348 P.2d 577; *People v. Schader,* 62 Cal.2d 716, 726 [44 Cal. Rptr. 193, 401 P.2d 665].) A mere hunch, without more, that a person may be involved in criminal activity is, of course, insufficient. (*People v. One 1960 Cadillac Coupe, supra.*)"

We are concerned here only with the constitutionality of the statute. We are not concerned with the reasonableness of the officer's action in arresting the defendant. Whether his action was reasonable necessarily depends upon the facts and circumstances of the case as developed at the time of trial. (*People v. Perez,* 243 Cal.App.2d 528; *People v. Bird,*[6] 248 Cal.App.2d. ...., ...)

The conclusion we have reached is in accord with the Commentary of the Reporters on section 2.02, subdi-

[6]Advance Report Citation: 248 A.C.A. 358, 361.

visions (2) and (3), of A Model Code of Pre-Arraignment Procedure, Tentative Draft No. 1, submitted to The American Law Institute in 1966.[7] Section 2.02, subdivision (1) of that tenative draft provides for the stopping of persons who may have knowledge which may be of material aid to the investigation of some crime. Subdivisions (2) and (3) read: "(2) *Stopping of Persons in Suspicious Circumstances.* A law enforcement officer lawfully present in any place may, if a person is observed in circumstances which suggest that he has committed or is about to commit a felony or misdemeanor, and such action is reasonably necessary to enable the officer to determine the lawfulness of that person's conduct, order that person to remain in or near such place in the officer's presence for a period of not more than twenty minutes. (3) *Action to Be Taken During Period of Stop.* A law enforcement officer may require a period to remain in his presence pursuant to subsection (1) or (2) of this section only insofar as such action is reasonably necessary to (a) obtain the identification of such person; (b) verify by readily available information an identification of such person; (c) request cooperation pursuant to and subject to the limitations of Section 2.01; or (d) verify by readily available information any account of his presence or conduct or other information given by such person."

In their Commentary on section 2.02 of the tentative draft the Reporters say in part (p. 93): "Some

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[7] After extended discussion at the Annual Meeting, section 2.02 of the tentative draft was recommitted to the Reporters for reconsideration with instructions that included approval of the principle of "stop and frisk." (34 U.S. Law Week 2641-2644, May 24, 1966.)

authority to interfere with liberty on less than reasonable cause has been explicitly recognized even in the absence of statute by the courts in a number of jurisdictions, including one Federal Court on Appeals."[8] As to the constitutionality of the proposal the Reporters say (p. 94): "There appear to be no compelling constitutional objections to an authority to stop persons briefly for purpose of criminal investigation. In the single case that squarely raised before the Supreme Court the issue of the constitutionality of such an exercise of power, *Rios v. United States*, 364 U.S. 253 (1960), the court declined to decide the question. Where such a power has been explicitly granted by statute, it has been consistently upheld.[9] And even in the

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[8]The Reporters' footnote to this statement reads: "5. *United States v. Vita*, 294 F.2d 524, 529-30 (2d Cir. 1961), *cert. denied*, 369 U.S. 823 (1962) ('The rule [of Federal R. Crim. Proc. 5(a)] does not apply to a case in which federal officers detain a suspect for a short and reasonable period in order to question him.'); *United States v. Bonanno*, 180 F.Supp. 71 (S.D.N.Y.), *rev'd on other gounds sub nom. United States v. Bufalino*, 285 F.2d 408 (2d Cir. 1960); *Goss v. State*, 390 P.2d 220, 224 (Alaska), *cert. denied*, 379 U.S. 859 (1964) ('when the officer stopped the car he was doing nothing more than conducting an investigation in response to circumstances that aroused his suspicion'); *People v. Mickelson*, 59 Cal.2d 448, 30 Cal. Rptr. 18, 380 P.2d 658 (1963); *People v. Faginkrantz*, 21 Ill.2d 75, 171 N.E.2d 5 (1960); *People v. Henneman*, 367 Ill. 151, 10 N.E.2d 649 (1937); *State v. Freeland*, 255 Iowa 1334, 125 N.W.2d 825 (1964); *People v. Rivera*, 14 N.Y.2d 441, 201 N.E.2d 32 (1964), *cert. denied*, 379 U.S. 978 (1965); *State v. Zupan*, 155 Wash. 80, 283 Pac. 671 (1929); *State v. Hatfield*, 112 W.Va. 424, 164 S.E. 518 (1932)."

[9]The Reporters' footnote here reads: "9. See *Commonwealth v. Lehan*, 196 N.E.2d 840 (Mass. 1964), and authorities cited in note 1 *supra*." The authorities there cited are *Cannon v. State*, 53 Del. 284, 168 A.2d 108 (1961); *De Salvatore v. State*, 52 Del. 550, 163 A.2d 244 (1960); *Kavanagh v. Stenhouse*, 93 R.I. 252, 174 A.2d 560 (1961); *appeal dismissed*, 368 U.S. 516 (1962). See generally Warner, *The Uniform Arrest Act*, 28 Va. L. Rev. 315, 320-321 (1942).

absence of statute most courts which have confronted the issue have recognized the constitutional validity of such a power."[10]

Claim of Privilege Against Self-Incrimination

Defendant's final contention is that section 647, subdivision (e), is unconstitutional because it violates the right of an individual not to be compelled to be a witness against himself, because it invades the right of privacy, and violates due process of law. We are of the opinion that these contentions cannot be sustained.

"The privilege against self-incrimination applies to evidence of 'communications or testimony' of the accused, but not to 'real or physical evidence' derived from him" (*People v. Ellis,*[11] 65 Cal.2d ....., ..., and authorities there cited.) In *Ellis* it was held that "The results of voice identification tests fall within the category of real or physical evidence." In *People v. Sudduth,*[12] 65 Cal.2d ....., ..., the court held that a suspect has no constitutional right to refuse a test for intoxication "designed to produce physical evidence in the form of a breath sample." In *Schmerber v. California,* 384 U.S. 757, 16 L. Ed.2d 908, cited in support of the rule as stated in *Ellis* and *Sudduth,* the court held that (p. 914) "the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of the analysis in question in this case did not involve compulsion to these ends."

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[10]The Reporters here refer to the "authorities cited in note 5 *supra,*" quoted in our footnote 8, *supra.*

[11]Advance Report Citation: 65 A.C. 571, 575.

[12]Advance Report Citation: 65 A.C. 585, 588.

The court there noted (p. 916) that "both federal and state courts have usually held that it offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it."

Section 647, subdivision (e), provides that a person who, in the circumstances there stated, refuses to identify himself and to account for his presence, is guilty of disorderly conduct. Defendant argues that the essential element of the crime here defined is his silence when requested by the peace officer to speak, and that his right to remain silent is protected by the Fifth Amendment. To put it otherwise, his contention is that the obligation to speak imposed on him by the section results in compulsory self-incrimination, in that he is thereby compelled "to provide the State with evidence of a testimonial or communicative nature" (*Schmerber v. California*, 384 U.S. 757, 16 L. Ed.2d 908, 914), which may be used against him at his trial for disorderly conduct.[13] This argument is not tenable.

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[13]In Respondent's Reply to Supplemental Briefs of Amici Curiae counsel say: "The question under 647(e) is not whether, if the defendant is charged with the commission of *another* crime, his refusal to answer may be used against him, or an incriminating st[illegible]ment he made either with or without a *Miranda-Escobeao* warning is admissible in evidence. *The* 'crime' under 647(e) is his not having answered. *If* he had answered there would, presumably be no charge under the section. Accordingly, even assuming *arguendo* that the *Miranda-Escobeda* warning need not be given and assuming that silence

As we read the authorities, section 647, subdivision (e), cannot be construed as requiring the person interrogated by the peace officer to be a witness against himself. While it is true that he may be found guilty of disorderly conduct if he remains silent, "The silence here is mere nonassertive conduct; it is not a declaration but a failure to offer an explanation, under circumstances which call for one." (*People v. Wilson,* 238 Cal.App.2d 447, 456, pet. for hearing in Supreme Court denied.) It was held in *Wilson* that evidence of defendant's silence was admissible in his later prosecution for burglary.

In affirming the conviction in *Wilson* the court, at page 458, took note of the rule, as stated in *People v. Simon,* 45 Cal.2d 645, 650, that "There is, of course, nothing unreasonable in an officer's questioning persons outdoors at night [citations], and it is possible that in some circumstances even a refusal to answer would, in the light of other evidence, justify an arrest. [Citations.]" Then, after quoting section 647, subdivision (e), as enacted in 1961, the court said: "If there is such a right to interrogate, the results of such interrogation should be available where they reflect conduct on the part of the defendant which tends to establish his guilt unless there is a supervening policy of the law which prevents the use of the conduct or statements of the accused." The court found that there was no such supervening policy. In reaching this conclusion the court said in part (p. 459): "Circum-

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or a statement could be used against the defendant were he prosecuted for a *different* crime—the one, presumably for which the stopping and questioning was done—that still is no basis for it being a crime not to have answered. If a statement is voluntarily made, that is one thing. But when a statement is *not* made, that is quite another."

stances may be imagined where answering the type of question here involved would violate the provision against self-incrimination which has been extended to nontestimonial compulsion. (See *People v. Dorado, supra,* 62 Cal.2d at p. 352, applying *Escobedo v. Illinois* (1964) 378 U.S. 478 [84 S.Ct. 1758, 12 L.Ed. 2d 977]; and *People v. Stewart, supra,* 236 Cal.App.2d 27, 30.) *Dorado,* however, recognizes: 'Nothing that we have said, of course, should be interpreted to restrict law enforcement officers during the investigatory stage from securing information from one who is later accused of the crime or from obtaining answers to their questions.' (62 Cal.2d at p. 354.) So here appears a second distinction between the facts of this case and those of *Dorado, Stewart* and *De Leon* [236 Cal.App. 2d 530]. The circumstances here reflect that at the time the preliminary questions were asked the officers did not know what crime, if any, had been committed. The questions were not designed to elicit incriminating statements, but to afford the defendant an opportunity to explain his presence and actions."

It is also suggested that when a person is interrogated by a peace officer under the circumstances delineated in section 647, subdivision (e), the peace officer is required to advise him of his right to remain silent in accordance with the rules stated in *Miranda v. Arizona,* 384 U.S. 436, 16 L. Ed.2d 694. This suggestion ignores the explicit holding of *Miranda* (16 L. Ed. 2d 725-726) that the principles there announced "deal with the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom

of action in any significant way. . . . Our decision is not intended to hamper the traditional function of police officers in investigating crime. See Escobedo v. Illinois, 378 US 478, 492, 12 L ed 2d 977, 986, 84 S Ct 1758. When an individual is in custody on probable cause, the police may, of course, seek out evidence in the field to be used at trial against him. Such investigation may include inquiry of persons not under restraint. General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present."

There is no need to extend this opinion with a discussion of the myriad cases in which the rules stated in *Escobedo, Dorado* and *Miranda* have been discussed, distinguished and applied.[14] It is enough to note that we have found none which hold that a person stopped for interrogation by a peace officer in the circumstances set forth in section 647, subdivision (e), where there is no probable cause for arrest and there is no arrest, is in "custody or otherwise deprived of his freedom of action in any significant way." (See Graham, *What is "Custodial Interrogation?"* 14 UCLA L. Rev. 59, 78-92; *People v. Arnold,*[15] 66 Cal.2d ....., ...)

If we are correct in our conclusion that the silence of a person who is stopped for interrogation as provided

[14]The decision in one of these cases, *People v. Cotter,* 63 Cal.2d 386, was vacated April 20, 1967. See Minutes, p. 3, in 66 A.C., No. 7.

[15]Advance Report Citation: 66 A.C. 449, 459 [6].

in section 647, subdivision (e), is "nonassertive conduct" which does not fall within the ambit of the Fifth Amendment, it follows that the interrogation there provided does not constitute an unconstitutional invasion of his privacy. (Cf. *People v. Ellis,*[16] 65 Cal.2d ....., ...)

In short, we have found no authority to sustain the contentions that one who loiters or wanders upon the streets or from place to place without apparent reason or business has a constitutional right to remain silent when the surrounding circumstances are such as to indicate to a peace officer as a reasonable man that the public safety demands that he identify himself. As the court said in *People v. Machel,* 234 Cal.App.2d 37, 43, the "California rule permitting temporary detention for questioning 'strikes a balance between a person's interest in immunity from police interference and the community's interest in law enforcement. It wards off pressure to equate reasonable cause to investigate with reasonable cause to arrest, thus protecting the innocent from the risk of arrest when no more than reasonable investigation is justified.' (*People v. Mickelson, supra,* 59 Cal.2d at p. 452.) While it is operative under circumstances short of probable cause to make an arrest (*People v. Mickelson, supra*) 'nevertheless there must exist *some* suspicious or unusual circumstance to authorize even this limited invasion of a citizen's privacy.' (*Hood v. Superior Court* (1963) 220 Cal.App.2d 242, 245 [33 Cal. Rptr. 782]; *People v. Cowman* (1963) 223 Cal.App.2d 109, 116 [35 Cal.Rptr. 528].)" Section 647, subdivision (e), is no more than a codification of that rule. (*People v. Wilson,* 238 Cal.App.2d 447, 458.)

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[16]Advance Report Citation: 65 A.C. 571, 577.

In our opinion section 647, subdivision (e), of the Penal Code as enacted in 1961 is constitutional.

The order dismissing the complaint is reversed.

McCOY, *J.* pro tem.*

I CONCUR:

The Los Angeles County Bar Association has as its motto a saying of Theodore Roosevelt that "Every man owes some of his time to the upbuilding of the profession to which he belongs." I think a comparable duty rests on the citizen at large of whom it can be said, "Every citizen owes some of his time to the tranquility of the society to which he belongs." The legal duty of the citizen to assist public authority in preserving the peace has been firmly established for hundreds of years and is manifest in such obligations as the duty to assist the posse comitatus, to join the hue and cry, to expose treason, and to disclose the commission of known felonies to proper authority.[1] (Gov. Code, §§ 26600, 26602, 26604; Pen. Code §§ 38, 150, 839; 18 U. S. Code, §§ 4, 2382.)

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*By assignment of the Chairman of the Judicial Council.

[1]"Ever since the days of hue and cry, it has been the duty of a man, who knows that a felony has been committed, to report it to the proper authority so that steps can be taken to apprehend the felon and bring him to justice. In the thirteenth century it was his duty 'to raise hue and cry,' that is to say, he had to report to the sheriff of the county or his officer or to the constable of the town: whereupon it was the duty of that officer to levy hue and cry, that is, to shout aloud calling on all able-bodied men over the age of 15 to pursue the offender and arrest him: and it was their duty to join in the

(This footnote is continued on the next page)

I think it well within the scope of this duty to require a citizen to identify and account for his presence to public authority when he is abroad at 2:30 in the morning under circumstances where the public safety demands such identification. In so doing the citizen makes a positive contribution to the tranquility of the neighborhood by releasing a peace officer for the performance of his duties elsewhere.

This duty to identify and account I find substantially similar to the duty of a motorist on the highway to identify himself and establish his right to be on the highway, to demonstrate his condition to exercise that right safely, and to report accidents involving property damage, personal injury, or death. (Veh. Code, §§ 12951, 20002, 20003, 20004, 40302, subd. (a), 2804.) It is comparable to the duty to identify and account which we fulfill at the demand of the building superintendent when we enter our office late at night, which we satisfy at the demand of customs and immigration inspectors when we return from overseas, which we carry out at the demand of the Director of Internal Revenue when we file our income tax returns. These

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pursuit." (Lord Denning, J., *Sykes v. Director of Public Prosecutions*, [1962] A.C. 528, 555.)

"1612. Sir Francis Bacon, in the Countess of Shrewsbury's Trial, 2 How.St.Tr. 769, 778: 'You must know all subjects, without distinction of degrees, owe to the king tribute and service, not only of their deed and hand, but of their knowledge and discovery. If there be anything that imports the king's service, they ought themselves undemanded to impart it; much more, if they be called and examined, whether it be of their own fact or of another's they ought to make direct answer.'" (8 Wigmore on Evidence (3rd ed.) § 2190, p. 60.)

inquisitions, oral and written, sometimes inconvenient, sometimes vexing, are part of the price we pay to insure domestic tranquility and promote the general welfare.

The theory that one owes no duties to one's neighbors and is under no obligation to render even small assistance to the public order by identifying and accounting for oneself and thus releasing a peace officer for other work, derives from the exaggerated and extreme individualism of another era, an individualism reflected in the statement of a Vanderbilt, "The public be damned," and similarly reflected in the strictures of a Proudhon against all government.[2] The theory is essentially anarchistic and hostile to all law, and it implies that the relationship of the citizen to public authority is comparable to that of the inhabitants of a conquered province to an army of occupation, who recognize no legal obligations owed to their temporary masters and whose relationship with them is based entirely on force. But in a society based on law the pure theory of individualism must defer to a reasonable accommodation

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[2]"To be governed is to be watched, inspected, spied on, regulated, indoctrinated, preached at, controlled, ruled, censored, by persons who have neither wisdom nor virtue. It is every action and transaction to be registered, stamped, taxed, patented, licensed, assessed, measured, reprimanded, corrected, frustrated. Under pretext of the public good it is to be exploited, monopolized, embezzled, robbed and then, at the least protest or word of complaint, to be fined, harassed, vilified, beaten up, bludgeoned, disarmed, judged, condemned, imprisoned, shot, garroted, deported, sold, betrayed, swindled, deceived, outraged, dishonored. That's government, that's its justice, that's its morality.'" (Pierre Proudhon, quoted in Tuckman, The Proud Tower, p. 65.)

between private privilege and public interest. When the public safety reasonably demands identification at 2:30 in the morning, the citizen has no constitutional right to remain anonymous.

With respect to that provision of the Fifth Amendment which states that no person shall be compelled in any criminal case to be a witness against himself, its definition of a criminal case has never been extended to include general investigation. (*People v. Perez,*[3] 65 Cal.2d ....., ...:) The position of a person under general investigation is comparable to that of a witness before any judicial, legislative, or administrative officer. If the witness feels that answers to questions put to him will tend to incriminate him he may claim the privilege against self-incrimination. If the privilege has been well claimed, he is entitled to remain silent. (*United States v. Burr,* 25 Fed.Cas.No. 14692(e), (Marshall, C.J.).) But until the privilege has been validly claimed, his civic duty to identify and account continues in force. (*Sullivan v. United States,* 274 U.S. 259, 263-264 (Holmes, J.); *Communist Party v. Control Board,* 367 U.S. 1, 105-110 (Frankfurter, J.).)

I conclude that Penal Code, section 647, subdivision (e), draws on civic duty without unduly infringing individual right, and is therefore constitutional.

FLEMING, *J.*

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[3]Advance Report Citation: 65 A.C. 761, 768-769.

I DISSENT:

Despite my very strong desire to support and sanction any and all constitutional provisions of law reasonably designed to strengthen and increase the effectiveness of our law enforcement officers in the performance of their exceedingly difficult work of detecting and preventing crime in this age of increasing lawlessness, I feel obliged to dissent and this for two major reasons.

First, I am persuaded that the judges of the trial court and of the appellate department were correct in their holdings that the law here in question is unconstitutional. In the circumstances of this case I deem it unnecessary to repeat or set forth herein the reasoning of the decision of the appellate department. Suffice it here to say that in the light of established principles of constitutional law, I believe that this statute will be held incompatible with the dictates of the Fourth and Fifth Amendments to the federal Constitution.

Secondly, I apprehend that even if this law were not vulnerable to attack on constitutional grounds, its operation in the context of the entire complex of constitutional principles which have been enunciated by the Supreme Court of the United States in recent times would entail results more harmful than beneficial to the aims of effective law enforcement.

For example, it would appear that statements given by an apparent "loiterer" in response even to "normal investigatory questioning"[1] might be deemed to have

[1]Cf. *People v. Perez*, 65 A.C. 761, 768.

been given under penal compulsion and therefore inadmissible in a subsequent prosecution of the "loiterer" for the murder or the robbery which the officers were seeking to solve when they propounded their proper investigatory questions.[2]

I am unable to agree with the view of my colleagues that section 647, subdivision (e), "is no more than a codification of [the] rule" sanctioning the propriety of police action in temporarily detaining citizens and questioning them in circumstantial situations in which such police action appears reasonable. (Cf. *People v. Mickelson*, 59 Cal.2d 448, 450; *Hood v. Superior Court*, 220 Cal.App.2d 242; *People v. Cowman*, 223 Cal.App.2d 109; *People v. Bird*,[3] 248 Cal.App.2d .....) As author of the opinions in *Hood, Cowman* and *Bird*, I am obviously in complete accord with the law therein enunciated. If section 647, subdivision (e), were no more than a codification of presently accepted decisional law, there would be no compelling need for the enactment of this statute. As I have indicated, I fear that the effect of section 647, subdivision (e), would not be to augment or strengthen but rather to jeopardize the effectiveness of the present rule which sanctions investigatory questioning.

HERNDON, Acting *P. J.*

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[2]Cf. *Garrity v. New Jersey*, ... U.S. ..... 17 L. Ed. 2d 562; and *Spevack v. Klein*, ... U.S. ....., 17 L. Ed.2d 574.

[3]Advance Report Citation: 248 A.C.A. 358.

Modification of Opinion.

In the Court of Appeal of the State of California, Second Appellate District, Division Two.

People of the State of California, Plaintiff and Appellant, v. Chester W. Weger, Defendant and Respondent. 2d Cr. No. 13090.

Filed: June 23, 1967.

THE COURT:

Good cause appearing therefor the opinion filed June 5, 1967, in the above entitled cause is modified by the Court on its own motion as follows:

The sentence beginning at the bottom of page 18 of the opinion as filed, reading: "This discretion is analogous to the discretion vested in such officers to make an arrest in circumstances short of probable cause," is deleted, and the following sentence is substituted therefor: "This discretion is analogous to the discretion vested in such officers to stop pedestrians or motorists on the streets for questioning under circumstances short of probable cause to make an arrest."

APPENDIX B.

Memorandum Opinion and Judgment.

Appellate Department of the Superior Court, of the State of California for the County of Los Angeles.

People of the State of California, Plaintiff and Appellant, vs. Chester W. Weger, Defendant and Respondent. Superior Court No. CR A 7178. Trial Court No. M 79160.

Appeal by People from judgment of dismissal of the Municipal Court of the Pasadena Judicial District, Louis T. Fletcher, Judge.

Affirmed.

For Appellant—Byron B. Gentry, City Prosecutor.

For Respondent—Neiman and Sieroty and Wirin, Okrand and Sperber by Allen I. Neiman, Esq.

The People appeal from a judgment of dismissal entered after respondent's general demurrer to the complaint was sustained with leave to amend and the People declined to amend. The trial court dismissed the complaint on the ground that Penal Code Section 647, subsection (e), upon which the complaint was based, is unconstitutional.

The respondent was not in jeopardy, and the right of the People to appeal is unchallenged.

Introduction

Penal Code Section 647 (e) is unconstitutional.

To construe the statute and to understand why, upon any construction proposed, the statute is unconstitutional requires a review of the background of the statute, including the law of vagrancy which was its

initial source, the evolution of stop-and-inquire laws, and the legislative history which precedes its adoption. The threads from which the statute was woven are long and in some respects tangled. We begin with the history of vagrancy and add each strand as it appeared historically to reach our ultimate decision on constitutionality.

Penal Code Section 647 (e), as enacted in 1961,[1] provides that every person is guilty of disorderly conduct, a misdemeanor:

> "[W]ho [1] loiters or wanders upon the streets or from place to place without apparent reason or business and [2] who refuses to identify himself and to account for his presence when requested by any peace officer so to do, [3] if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification." [Bracketed numerals added.]

Each of the three numbered clauses of Section 647 (e) was drawn from a separate source, and each has a lengthy history. The first clause is a restatement of the ancient crime of vagrancy; the second clause was drafted by Professor Arthur Sherry; the third clause was added by a subcommittee of the Assembly Interim Committee on Judiciary.

The History of the Vagrancy Clause:

"Who Loiters or Wanders Upon the Streets or From Place to Place Without Apparent Reason or Business"

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[1]The 1961 version is the present statute added Stat. 1961, c. 560, p. 1672, as amended Stat. 1965, c. 1959, p. 4487.

The genealogy of vagrancy is easily traced. Vagrancy laws were initially enacted in 14th century England to bolster the crumbling feudal system by confining workers to defined areas, and were later expanded to include a motley collection of persons whose status society did not admire and whose way of life was believed to dispose them toward commission of other crimes.[2] Vagrancy was a crime of inaction—a crime of personal status, condition, or repute. A vagrant was defined in terms of ordinary usage but illusive meaning, such as "common prostitute", "common drunkard", "tramp", "idler", "associate of known thieves", "wanderer who cannot give a good account of himself". The elasticity of the labels permitted punishment of widely diverse persons for different purposes.[3] The durability of vagrancy is explicable, not by reference to respect accorded the substantive elements of the crime,[4] but by the tenacious efforts of law enforcement agencies, usually supported by the judiciary, to preserve the by-

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[2]Sherry, *"Vagrants, Rogues and Vagabonds—Old Concepts in Need of Revision,"* 48 Calif.L.Rev. 557 (1960); Lacey, *"Vagrancy and Other Crimes of Personal Condition,"* 66 Harv. L.Rev. 1203, 1206-07 (1953).

[3]*E.g.*, Sherry, *op.cit.supra*, 48 Calif.L.Rev. at 558-61; Lacey, *op.cit.supra*, 66 Harv.L.Rev. 1203, 1218-19; Foote, *"Vagrancy-Type Law and its Administration,"* 104 U.Pa.L.Rev. 603 (1956); Arnold, *"Law Enforcement—An Attempt at Social Dissection,"* 42 Yale L.J. 1, 9 (1932); Note, *"Who is a Vagrant in California?"* 23 Calif.L.Rev. 506, 511 (1935).

[4]Substantial inroads have been made on status offenses: *E.g., In re Newbern* (1960), 53 Cal.2d 786, holding the "common drunk" provision of the former California vagrancy statute unconstitutionally vague. See also *Robinson v. California* (1962) 370 U.S. 660, striking down that part of Calif. Health & Safety Code § 1711 making punishable the status of drug addiction; *Lambert v. California* (1957) 355 U.S. 225, 229, invalidating an ordinance penalizing mere presence in the city of a person with undesirable status unaccompanied by active conduct on the part of the defendant.

products of vagrancy which have long been found very useful. Prominent among the by-products of vagrancy have been these: (1) vagrancy arrest for the purpose of obtaining custody of one who could not be lawfully arrested for the offense of which he was suspected, either because the officer did not have probable cause to believe the suspect had committed a felony, or because the suspected crime was a misdemeanor committed outside the arresting officer's presence;[5] (2) vagrancy arrest as a prelude to a conviction upon an offense less difficult to prove than a more specific crime of which a defendant was suspected;[6] (3) vagrancy as a lesser offense to which a defendant could plead to avoid the harsher penalties or stigma attached to more specific crimes, particularly in the area of sexual offenses;[7] (4) vagrancy arrest as the means of validating searches and seizures and thus permitting the fruit of such searches and seizures to be introduced in a subsequent prosecution for a felony for which officers, at the time of arrest, had insufficient evidence to constitute probable cause to arrest; and[8] (5) vagrancy arrest, or

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[5]*E.g., People v. Craig* (1907) 152 Cal. 42, 47, where a police officer candidly explained his reason for arresting for vagrancy by testifying: "On this morning I was notified that this man and Mack had beat up a man by Officer Ryan and I says: 'Well, the only thing we can do—we didn't see it' 'we will go and vag them.'" And see discussion, LaFave, *"Arrest: The Decision to Take a Suspect into Custody,"* pp. 354 et seq. (1965).

[6]*E.g.,* Lacey, *op.cit.supra,* 66 Harv.L.Rev. at 1213-15, 1218-19; *Arnold, op.cit.supra,* 42 Yale L.J. at 9.

[7]*Ibid.*

[8]*E.g.,* LaFave, *op.cit.supra,* pp. 358-59.
If the arrest for vagrancy is an obvious subterfuge to secure evidence of a different offense, an appellate court may nevertheless hold the fruit of an accompanying search and

(This footnote is continued on the next page)

arrest and release, to legitimate temporary restraint, inquiry, and superficial search, in jurisdictions in which these procedures are not otherwise specifically authorized, or are forbidden.[9]

We are primarily concerned with the fourth and fifth by-products of vagrancy.

Constitutional and statutory limitations upon arrests, searches and seizures narrowly circumscribe law enforcement officers' activities in investigating and preventing crime. The problem is how to strike the appropriate balance between the interest of the individual in being free from any personal restraint and from police prying and the interest of society in protecting itself from antisocial conduct by giving law enforcement officers the necessary latitude to apprehend criminals and prevent crime. The interest of the individual in freedom of his person is of such compelling force that deprivation of that freedom by an arrest has long been subject to stringent regulation. At common law peace officers could arrest without a warrant only for those petty offenses involving a breach of the peace occurring in their presence or for those felonies committed outside their presence upon probable or reasonable cause to believe that the person arrested had committed a felony.[10] The common law rules, with some

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seizure violative of the Fourth Amendment. *E.g., People v. Wilson* (1956) 145 Cal.App.2d 1, 5. The court's discussion of the point is dictum, however, because the court found the evidence also inadequate to arrest for vagrancy. See also *People v. Harris* (1956) 146 Cal.App.2d 142, 145-46.

[9]*E.g.*, LaFave, *op.cit.supra*, pp. 354-359; Note, *"Use of Vagrancy-Type Laws for Arrest and Detention of Suspicious Persons,"* 59 Yale L.J. 1351, 1358 (1950).

[10]*E.g.*, Perkins, *"The Law of Arrest"*, 25 Iowa L.Rev. 201 (1940).

modification, have been codified in many jurisdictions, including California.[11]

"Reasonable clause" is a term of applied art in the law of arrest and the law of search and seizure.[12] The term defies comprehensive definition, but by any accepted definition excludes mere suspicion.[13] The restrictions upon the law of arrest ill suit the use of arrest for a specific crime as the basis for detaining and questioning suspicious persons for the purpose of investigating an unsolved crime or of preventing future crime.

A variety of approaches has been used and proposed to provide a supportable foundation for detaining and questioning suspicious persons.[14] Of these the most

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[11]California Penal Code Sections 834-51 embody the basic statutory law of arrest.

The concept of "reasonable cause," traditionally limited to felonies, was injected into arrests by officers for misdemeanors committed in their presence by the decision of *Coverstone v. Davies* (1952) 38 Cal.2d 315. The principle was reiterated in *Miller v. Glass* (1955) 44 Cal.2d 359. It is at least arguable that the court did not intend to change the law of arrest in these decisions, but merely to create a defense in the nature of privilege which an officer could assert in a subsequent civil case to prevent imposition of civil liability. The caveat is academic, however, because the *Coverstone* principle was written into Penal Code Section 836 when it was redrafted in 1957.

[12]The law of arrest and of search and seizure is intertwined. If an arrest be unlawful, reasonable cause to conduct a search incident to the arrest is destroyed. *Johnson v. United States* (1948) 333 U.S. 10. An arrest cannot be justified by what is turned up by an exploratory search. *Rios v. United States* (1960) 364 U.S. 253; *People v. Brown* (1955) 45 Cal.2d 640, 644.

Evidence obtained as a result of an unlawful search is excluded in a subsequent criminal prosecution of the person illegally searched. *E.g., Mapp v. Ohio* (1961) 376 U.S. 643; *People v. Cahan* (9155) 44 Cal.2d 434.

[13]*E.g.*, see Witkin, *California Criminal Procedure* (1963) pp. 102-04, §§ 103, 104.

[14]See discussion of the Uniform Arrest Act, the New York "Stop and Frisk Act", and the Model Code of Pre-Arraignment Procedure, *infra*.

venerable is the vagrancy statute making socially undesirable status, unaccompanied by affirmative acts, a crime, or making equivocal conduct, not itself amounting to any other specific offense, a crime. If the crime is thus defined in language of substantial flexibility, reasonable cause to arrest for that crime becomes equally flexible, permitting law enforcement officers to arrest on little more than suspicion.

Suspicious loitering, a status offense, was a feature of California's vagrancy statute from 1855, when the first vagrancy law was adopted, until the statute was rewritten in 1961.[15] Clause [1] of the present code section was drawn directly from subsections 3 and 6 of former Penal Code Section 647, which, respectively, defined as a vagrant "every person who roams about from place to place without any lawful business;" and "every person who wanders about the streets at late or unusual hours of the night, without any visible or lawful business."[16]

Professor Sherry initially drafted both Clauses [1] and [2] in 1958 at the request of the subcommittee of the Assembly Interim Committee on Judiciary. Assembly Bill 2712, introduced in the 1959 legislative session, embodied some of the provisions of Professor

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[15]Cal. Stat. 1855, c. 175, p. 217. Amendments were minor in the years from 1855 to 1961, other than the addition of narcotics addiction in 1929 and its subtraction in 1939.

[16]Professor Arthur Sherry, who drafted both Clauses [1] and [2], explained that Clause [1] was "designed to replace subdivisions 3 and 6 of the present code section by providing a more specific description of the kind of suspicious person that the police are bound to deal with." Sherry, *op.cit.supra*, 48 Calif.L.Rev. at 571.

As a comparison of the language between Professor Sherry's Clause and the former code sections reveals, Clause [1] is merely an amalgamation of the prior two sections, and it is no more specific than its ancestors.

Sherry's vagrancy proposal, but conspiciously omitted the provisions embodied in his Section 5, which then consisted only of Clauses [1] and [2]. The bill was vetoed by the Governor.[17]

Professor Sherry's draft was taken up again in the 1961 legislative session. Criticism of the status features of the vagrancy laws was unabated. The draft was referred to the Interim Committee on Criminal Procedure, and that Committee, in its report to the Legislature, made explicitly clear that the bill as recommended by it, was intended to eliminate status offenses.[18] The Committee was equally explicit that, in adopting Clauses [1] and [2] from the Sherry draft and its addition of Clause [3]; it did not intend to legitimate arrests based upon suspicion.[19]

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[17]In a letter, Governor Brown expressed his reasons for vetoing the bill, saying, in part:

". . . I am sympathetic to the overall purpose of the bill which was to punish individuals only for wrongful actions and not simply because of their status. But I found that in accomplishing this laudable objective the proposed legislation unfortunately removed from police control certain dangerous conduct, regulation of which is necessary in the public interest.

"The bill proposed to repeal subdivisions 3 and 6 of the present law without substituting any kind of control over those whose conduct afforded occasion for legitimate suspicion. I am aware that police action in this regard has led to criticism, and I agree that the present law should be revised. But I do not think that the possibility of abuse justifies completely denying any controls at all. Legislation in this area would be effective if it gave some definition of authority and obligation to which the private citizen and the policeman could reasonable [*sic*] and fairly conform. . . ." 22 Assembly Interim Committee Reports No. 1, pp. 11-12 (1961).

[18]22 Assembly Interim Committee Reports No. 1 (1961).

[19]"The Committee finds that Section 5, as proposed by Professor Sherry, would lend color of law to arrests based upon suspicion. It would invite a double standard of justice and leave too much discretion in the hands of the arresting officer. When probable cause exists, the officer may arrest without benefit of this section. Where probable cause does not exist, it would be better that no arrest be made." *Id.* at page 17.

History of Clause [2]:

"Who Refuses to Identify Himself and to Account for his Presence When Requested by Any Peace Officer So To Do"

Clause [2] is Professor Sherry's original contribution to the statute. He explained the purpose of the clause as follows:

> ". . . At the heart of the problem here is the great desirability of stating the terms of police authority in such a way as to minimize abuse without impairing the ability to take necessary action.[72] To write any law in complete accord with this standard is probably impossible but this is not a valid argument for simply denying the policy [police *sic*] power to take any action with respect to the 'suspicious person.' The draft attempts to spell out the limits of the policeman's authority and to declare some obligation on the part of the citizen to account for himself when his loitering arouses suspicion."[20]

Footnote 72 states:

> *"The provision in the draft requiring the suspicious loiterer to identify himself and to explain the reason for his actions upon the request of a peace officer is consistent with the authority which such officers have long possessed in California.* A dictum in the earliest case in which the private person's responsibility to respond to reasonable police

[20]Sherry, *op.cit.supra,* 48 Calif.L.Rev. 557, 571 (1960).

inquiry is discussed is in point with respect to the suspicious loiterer: 'A police officer has a right to make inquiry in a proper manner of anyone upon the public streets at a late hour as to his identity and the occasion of his presence, if the surroundings are such as to indicate to a reasonable man that the public safety demands such identification.' *Gisske v. Sanders*, 9 Cal.App. 13, 16, 98 Pac. 43, 45 (1908). Years later, the California Supreme Court adopted this conclusion in *People v. Simon*, 45 Cal.2d 645, 290 P.2d 531 (1955). For an illustrative suspicious person case and a useful summary of the law, see *People v. West*, 144 Cal.App.2d 214, 300 P.2d 729 (1956)."[21] [Emphasis added.]

Clause [2] was "consistent" with existing California authority in a Pickwickian sense only. To understand why this is so, it is necessary to review the authority upon which he relied.

The case of *Gisske v. Sanders*[22] was a civil action for damages for false imprisonment. Defendant police officer received a report that a suspicious person was in the vicinity of the city in which shortly before there had been both a burglary and a highway robbery. About 11 p.m. defendant accosted the plaintiff, who was walking along the street, and asked him where he was going and where he lived. Plaintiff answered, but questioned the officer's right to make the inquiry. De-

[21] *Id.* at 571.
[22] 9 Cal.App. 13 (1908).

fendant was apparently dissatisfied with plaintiff's answers and invited plaintiff to the station. Plaintiff willingly accompanied the defendant to the station, where he was searched, confined until the following morning, and released. The court held that the defendant was not liable for false imprisonment because not he, but his superior officer, ultimately incarcerated the plaintiff. In the course of the opinion, the court recited generally the duty of citizens to cooperate with the police and added, by way of obiter:

> "A police officer has a right to make inquiry in a proper manner of anyone upon the public streets at a late hour as to his identity and the occasion of his presence, if the surroundings are such as to indicate to a reasonable man that the public safety demands such identification." (9 Cal.App. at 16-17.)

The last-quoted phrase was used to describe the circumstances under which police officers can detain and question a person upon the streets. The court was not enunciating the basis for an arrest, although under all of the circumstances present in the case, including the equivocal answers of the plaintiff, the officers may have had probable cause to believe that the plaintiff had committed a felony. The court did *not* suggest that silence or evasive answers to police interrogation was itself a crime.

The court in *Gisske* relied, in part, upon the dictum of *Miller v. Fano*,[23] stating: "It is the duty of every citizen, when called upon, to give all information in

[23] 134 Cal. 103, 106-7 (1901).

his possession to the proper officers of the law as to persons connected with crimes."[24]

The dictum in *Miller* was merely a restatement of the apothegm that good citizens have a duty to cooperate with the police in the investigation and prevention of crime. Cooperation, truly voluntary, has been encouraged upon the part both of persons who are suspected of crime[25] and of persons who are not. The imposition of penal sanctions to compel co-operation by those who are not involved in a crime is very rare.[26] The imposition of criminal penalties to coerce testimonial cooperation by those who are suspected of crime has not been attempted, except in California Penal Code Section 647 (e), because of the extreme difficulty of framing an effective statute which does not exceed constitutional bounds.

The other case upon which Professor Sherry relied to support Clause [2] was *People v. Simon*, decided by the California Supreme Court in 1955.[27] Two youths, Simon and his minor friend, were observed by a police officer walking in a warehouse district shortly after

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[24]The court held that a private citizen could not be liable for false imprisonment simple because he made an identification at the police officer's request, later used by police to effect the arrest of plaintiff, the wrong man.

[25]See, *e.g., People v. Cotter* (1965) 63 Cal.2d 386, 396; *People v. Michael* (1955) 45 Cal.2d 751, 753, 754.

[26]One of these rare instances of compelled cooperation is California Penal Code Section 150, making it a misdmeanor for a man over 18 years old to refuse to join a posse comitatus, or to neglect requested aid in effecting an arrest.

For a discussion generally of sanctions to compel cooperation with the policy by those not themselves suspected of crime, see, Note, *"Criminal Law—Requiring Citizens to Aid a Peace Officer,"* 14 DePaul L.Rev. 159 (1964).

[27]45 Cal.2d 645.

ten o'clock at night. Simon's friend was carrying a bottle, apparently containing an alcoholic beverage. The officer, without any inquiry of either of the boys, searched both of them and found upon Simon a marijuana cigarette, for possession of which Simon was prosecuted. The court held that Simon's arrest and search were illegal. On these facts alone, the officer did not have probable cause to arrest or search, either on the ground that a misdemeanor was being committed in the officer's presence, or on the ground that a felony had been committed. Justice Traynor interposed a cautious dictum, which became the first step in the development of the stop-and-inquire and stop-and-frisk law which has evolved in California:

> "There is, of course, nothing unreasonable in an officer's questioning persons outdoors at night (*Gisske v. Sanders, supra,* 9 Cal.App. 13, 16-17; *People v. Exum,* 382 Ill. 204 [47 N.E.2d 56, 60]; *People v. Henneman,* 367 Ill. 151 [10 N.E. 2d 649, 650]; *United States v. Jankowski,* 28 F.2d 800, 802; see also *Morgan v. United States,* 159 F.2d 85, 86-87; *Kaiser v. United States,* 60 F.2d 410, 412-413; *Strogen v. United States,* 60 F.2d 483; *Brinegar v. United States,* 338 U.S. 160, 178 [69 S.Ct. 1302, 93 L.Ed. 1879], Burton, J., concurring) and *it is possible that in some circumstances even a refusal to answer would in the light of other evidence, justify an arrest.* . . . [I]n some circumstances an officer making such an inquiry might be justified in running his

hands over a person's clothing to protect himself from an attack with a hidden weapon. . . ."[28] [Emphasis added.]

By the emphasized language Justice Traynor meant that silence of a suspect, taken together with all of the other circumstances in a particular case, might constitute reasonable cause to believe that a felony had been committed, or a misdeameanor was being committed in his presence, justifying arrest without a warrant and an incidental search. He did *not* mean or imply that a suspect's silence could itself be made a crime for which the person could be arrested.

Two things are apparent: first, there was no clear-cut authority in California supporting the right of the police to detain a suspicious person for investigation at the time Professor Sherry drafted Clause [2]; and second, the authority which did exist did not purport to validate any duty on the part of the suspicious person to respond to the interrogation. Nothing in the cases upon which Professor Sherry relied even suggested that the detained person's failure to cooperate by answering police inquiries was, or could be made, a crime in the name of vagrancy, or disorderly conduct, or any other newly-minted offense. Professor Sherry's draft states the right of law enforcement officers in conducting an investigation in terms of duties, enforced by criminal sancations, imposed upon those suspected of crime, and thereby confuses both rights and duties.

The Interim Committee on Criminal Procedure was at least partly aware of the frailty of the authority upon which Professor Sherry relied, and for that reason added Clause [3] to the statute.

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[28] *Id.* at 650.

History of Clause [3]:

"If the Surrounding Circumstances Are Such as to Indicate to a Reasonable Man that the Public Safety Demands Such Identification."

The Committee explained its purpose in adding Clause [3] to Professor Sherry's Clauses [1] and [2]:

"Although Professor Sherry sets out a dictum from *Gisske v. Sanders* as a justification for the adoption of his proposed Section 5, we find that his argument rests only upon the first half of that dictum. It not only states that an officer has the right to make inquiry in a proper manner of anyone upon the public streets at a late hour as to his identity and the occasion of his presence, but goes on to say '. . .if the surroundings are such as to indicate to a reasonable man that the public safety demands such identification.' This phrase accords with many other cases holding that probable cause can consist of the refusal to answer questions *coupled with other circumstances*. There is no implication that such refusal alone would justify arrest. [Emphasis in original.] . . .

"An inconsistent answer, of itself, has been held insufficient probable cause for an arrest for vagrancy. [Citing *People v. Harris* (1956) 146 Cal. App.2d 142.] . . .

"The committee feels that any requirement that a citizen answer questions put to him by a police officer must be made with care.

"However, in an effort to combat crime more effectively, we recommend that Professor Sherry's proposed Section No. 5 be adopted with an amend-

ment. In order to make it fit more nearly the dictum from *Gisske v. Sanders,* upon which it is based, we recommend that the following phrase from that opinion be added:

"'. . . if the surroundings are such as to indicate to a reasonable man that the public safety demands such identification.' "[29]

The Committee's suggestion was accepted and, as passed, the statute combines Professor Sherry's revision of subsections 3 and 6 of the former statute as Clause [1], his original Clause [2], and the Committee's qualifying addendum as Clause [3].

Development of Stop-and-Inquire and Stop-and-Frisk Law

It was not until 1963 that the stop-and-inquire and stop-and-frisk principles were clearly enunciated in California. The occasion was the decision of *People v. Mickelson* (59 Cal.2d 448). Chief Justice Traynor said:

"[W]e have consistently held that circumstances short of probable cause to make an arrest may still justify an officer's stopping pedestrians or motorists on the streets for questioning. If the circumstances warrant it, he may in self-protection request a suspect to alight from an automobile or to submit to a superficial search for concealed weapons. Should the investigation then reveal probable cause to make an arrest, the officer may arrest the suspect and conduct a reasonable incidental search. [Citations omitted.]" (59 Cal.2d at 450-51.) . . .

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[29]22 Assembly Interim Committee Reports No. 1, p. 18.

> "We do not believe that our rule permitting temporary detention for questioning conflicts with the Fourth Amendment. It strikes a balance between a person's interest in immunity from police interference and the community's interest in law enforcement. It wards off pressure to equate reasonable cause to investigate with reasonable cause to arrest, thus protecting the innocent from the risk of arrest when no more than reasonable investigation is justified." (59 Cal.2d at 452.)[30]

A year later in *People v. One 1960 Cadillac Coupe*[31] the Supreme Court emphasized that the right of a police officer to stop and inquire shall not be arbitrarily exercised, but that the circumstances justifying inquiry must indicate to a reasonable man that some necessity exists for police investigation. The restatement of reasonable cause is a paraphrase of the qualifying language of the *Gisske* dictum.

In each of the many decisions following *Mickelson,* the stop-and-inquire principles were invoked to validate the use of evidence uncovered during the investigation either (a) to justify a felony arrest upon probable cause supplied in whole or in part by the

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[30]Federal practice forbids temporary detention for questioning without an arrest. *E.g., Henry v. United States* (1959) 361 U.S. 98. See also *Wong Sun v. United States* (1963) 371 U.S. 471.

At least as of 1963, state law relating to arrest and search has not been obliterated in favor of federal law by such decisions as *Mapp v. Ohio, supra,* 367 U.S. 643.

The conflict between federal and state practice is discussed in an article, Manwaring, *"California and the Fourth Amendment,"* 16 Stan.L.Rev. 318 (1964).

[31]62 Cal.2d 92, 95-96.

fruits of the preliminary investigation, or (b) to justify a search and seizure made incident to a felony arrest.[32]

Jurisdictions other than California have attempted to formulate stop-and-inquire principles by adopting statutes authorizing limited detention, short of arrest, for investigatory purposes. Rhode Island, New Hampshire, and Delaware adopted the Uniform Arrest Act, published by the Interstate Commission on Crime in 1941.[33] The Uniform Arrest Act attempts to distinguish between a pre-detention arrest and a lawful arrest. It authorizes police officers to stop, question, frisk, and detain for two hours any person abroad "who he has reasonble ground to suspect is committing, has committed or is about to commit a crime." The suspect must be released at the end of two hours unless there is probable cause to place him under arrest.[34] Decisions construing the Act have been inconclusive both in respect of its constitutionality and the

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[32]*E.g., People v. Rogers* (1966) 241 Adv.Cal.App. 478, 480-81; *People v. Machel* (1965) 234 Cal.App.2d 37, and the many cases collected in the footnotes at pp. 43 and 44.

[33]N.H.Rev.Stat.Ann., c. 594 (adopted 1941) as amended 1965; Del.Code Ann.tit. 11, §§ 1901-12 (1953) (adopted 1951); R.J. Gen. Laws Ann.tit. 12 c. 7 (1956) (adopted 1941).

[34]The full text of the Act is printed in Warnter, *"The Uniform Arrest Act,"* 28 Va.L.Rev. 315 (1942).

Section 2 of the Uniform Arrest Act provides:

"(1) A peace officer may stop any person abroad who he has reasonable ground to suspect is committing, has committed or is about to commit a crime, and may demand of him his name, address, business abroad and, whether he is going.

"(2) Any person so questioned who fails to identify himself or explain his actions to the satisfaction of the officer may be detained and further questioned and investigated.

"(3) The total period of detention provided for by this section shall not exceed two hours. The detention is not an arrest and shall not be recorded as an arrest in any official record. At the end of the detention the person so detained shall be released or be arrested and charged with a crime."

breadth of power thereby accorded police officers.[35] The New York "Stop and Frisk Act" is a variation of the Uniform Arrest Act, except that the suspect may not be detained if the questioning or frisk does not give the officer probable cause to arrest.[36] The constitutionality of the New York law has not been tested. The California Legislature in 1957 rejected a proposal for limited detention and interrogation patterned after the Uniform Arrest Act.[37]

A further variation and elaboration of detention for interrogation is illustrated by the first draft of the Model Code of Pre-Arraignment Procedure, Sections 2.01 and 2.02. The draftsmen have attempted to distinguish sharply the procedure applicable to generalized investigation, including questioning of witnesses, from the procedure applicable to an investigation of a person upon whom suspicion has focused. If an officer has reasonable cause to suspect that a person may have committed a crime, he must make clear to the person interrogated that such person has no legal obligation to respond to the questions. The draftsmen's notes appended to Section 2.02 emphasize that there is no authority to compel cooperation from the suspect.[38] No state has adopted the draft of the Model Code of Pre-Arraignment Procedure.

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[35]The cases are collected and analyzed in a Note, *"The Law of Arrest, Constitutionality of Detention and Frisk Act,"* 59 Nw. U.L. Rev. 641, 645-48 (1956). The Act has been sharply criticized by some legal writers, *e.g.*, Foote, *"The Fourth Amendment: Obstacle or Necessity in the Law of Arrest,"* 51 J.Crim.L., C & P.S. 402 (1960).

[36]N.Y. Code Crim. Proc. § 180(a) (1964).

[37]Collings, *"Toward Workable Rules of Search and Seizure—An Amicus Curiae Brief,"* 50 Calif.L.Rev. 421, 434 (1962).

[38]Tentative Draft No. 1, Model Code of Pre-Arraignment Procedure (1966).

Constitutionality of Penal Code Section 647 (e)

Clause [1], as we have seen, is a repetition of the ancient status-vagrancy crime. The words used have acquired over the years a meaning definite enough to withstand constitutional attack.[39] The first clause need not detain us long, however, because it is plain that the Legislature did not intend to preserve the status crime and that the heart of the statute is the second clause, read with the first and third.

The second clause makes silence, or articulated refusal to answer questions, an element of the crime.[40] The statute does not penalize a suspect who answers the questions. If he responds with an exculpatory answer, he is obviously not chargeable with violation of this or any other penal statute. If he responds with an incriminatory answer, he may therby implicate himself in another crime and possibly supply probable cause to arrest for that other crime, but he is not chargeable with the offense created by this statute. A response, which is somehow neither inculpatory nor exculpatory, but merely unsatisfactory to the police officer, cannot be deemed a refusal to respond within the meaning of the statute, because the legislative history makes clear that the Legislature did not intend to legalize arrests on suspicion. The third clause was inserted to prevent an officer's arresting a person solely

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[39]*Cf. In re Cregler* (1961) 56 Cal.2d 308, 311, 312; *In re Huddleson* (1964) 229 Cal.App.2d 618, 625.

[40]The situation must be distinguished from those cases in which the refusal is not a refusal to testify but is a refusal to cooperate in a non-testimonial procedure or test, *e.g., Schmerber v. California* (1966) 384 U.S. 757 (blood test); *People v. Sudduth* (Dec. 23, 1966) ..... Cal.2d ..... (refusal to submit to breathalyzer test); *People v. Ellis* (Dec. 23, 1966) .....Cal.2d ..... (voice identification test).

because the arresting officer was not subjectively satisfied with the suspect's answer. Unfortunately, the Committee did not explain how it expected its qualifying addendum to prevent arrests on suspicion or to survive constitutional attacks grounded on the Fourth and Fifth Amendments.

There appear to be only three possible constructions of Clause [3]: first, the officer must have reasonable cause to arrest for the very offense created by Section 647 (e) before the officer has the right to interrogate the suspect and penalize him for failure to respond; second, the officer must have reasonable cause to arrest for an offense other than an offense created by Section 647 (e) before the right to interrogate and the duty to respond arises; or third, the officer must have reasonable cause to detain and question for purposes of investigation, but less than enough cause to arrest for any offense, before the failure to respond constitutes a crime.

The first construction creates insurmountable difficulties in application and constitutionality. The elements of the offense would thereby be circular: the officer could not require response to questions until the questions had been asked without response. This is true because the third clause is itself an element of the corpus of the offense. Loitering or wandering, standing alone, is not the crime, nor does loitering or wandering, standing alone, constitute reasonable cause to believe that the crime stated by Section 647 (e) is being committed in the officer's presence. The statute requires the elements of each clause to coincide to effectuate the legislative intent. Moreover, the statute as thus construed would violate the Fifth Amendment. If

the officer has probable cause to believe that the suspect is violating Section 647 (e) at the time he commences interrogation, the accusatory stage is necessarily reached, since the suspect's failure to respond completes the crime stated by Section 647 (e). His silence is unmistakably incriminatory. The suspect cannot be penalized for exercising his constitutional right to silence. (*Miranda v. Arizona* (1966) 384 U.S. 436, 468; *Griffin v. California* (1965) 380 U.S. 609; *cf. Albertson v. Subversive Activities Control Board* (1965), 382 U.S. 70; *Russell v. U.S.* (9th Cir. 1962) 306 F.2d 402.) It is, of course, totally pointless for the officer to inform the suspect that he has a constitutional right to remain silent when his silence is the final element in this crime.[41]

The second possibility—reasonable cause to believe that an offense other than violation of 647 (e) has been committed—fares no better than the first. By definition, the interrogating officer must have reasonable cause to believe that the suspect has committed or is committing a crime before the duty to respond arises. The generalized investigation is over, and the suspect has a constitutional right to silence, which cannot be defeated by penalizing his silence criminally.

The third possibility is that Clause [3] means that the officer must have reasonable cause to detain and question for purposes of investigation, but insufficient cause to arrest for any offense. This construction most

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[41]*Cf. People v. Simmons* (1946) 28 Cal.2d 699, 716: "Of what avail is it to warn a defendant that he need not reply to police questioning unless he wishes to, and that anything he may say my be used against him, if, in the event he is unresponsive under this admonition, his silence or equivocal reply is later turned against him as indicative of a consciousness of guilt?"

closely accords with the intent of the draftsman of the statute, but it founders on both the Fourth and Fifth Amendments.

The Fourth Amendment problem inheres in the statute because the statute as thus interpreted legalizes an arrest upon grounds other than reasonable or probable cause. The Committee failed to perceive the important distinction between (1) reasonable cause justifying detention short of arrest for the puprose of investigation only, and (2) reasonable cause to justify an arrest. The *Gisske* and *Simon* dicta refer to reasonable cause to justify detention, not arrest. When reasonable cause justifying detention is itself made an element of a crime, the effect is to convert grounds for detention into grounds for arrest, a result which the Supreme Court in *Simon* and later in *Mickelson* and *One 1960 Cadillac Coupe* was at considerable pains to avoid.[42]

Our Supreme Court has preserved the distinction because the standard of reasonable cause to detain and inquire is a lesser standard than probable or reasonable cause to arrest. If reasonable cause to detain and reasonable cause to arrest were based upon identical standards, the addition of stop-and-inquire principles would be pointless. If a lesser standard to detain and inquire is converted into cause for arrest, the effect is to defeat the more stringent requirements of probable cause to arrest—a result which cannot be squared

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[42]*People v. Simon, supra,* 45 Cal.2d at 650; *People v. One 1960 Cadillac Coupe, supra,* 62 Cal.2d at 95-96; *Gisske v. Sanders, supra,* 9 Cal.App. at 16-17.

The same distinction has been steadfastly maintained in drafting statutes authorizing detention and questioning for investigatory purposes, such as the Uniform Arrest Act and its variations, discussed *supra.*

with the probable cause standard imposed upon the law of arrest by the Fourth Amendment.

If we attempt to avoid the Fourth Amendment difficulties by raising the standards of detention to the level of probable cause to arrest, we immediately encounter the identical Fifth Amendment problems to which the first two constructions have succumbed.

We therefore conclude that Section 647 (e), however construed, is unconstitutional on its face.[48]

Nothing in our decision striking down Penal Code Section 647 (e) should be interpreted as reflecting adversely upon the right of law enforcement officers to stop and inquire or to stop and frisk as those principles have been repeatedly stated by the appellate courts of this State. The constitutional infirmity of this statute lies, not in a statement of rights of law enforcement officers, but in the imposition of penal sanctions to compel performance of a duty to respond testimonially by one upon whom suspicion of crime has clearly focused.

The judgment is affirmed.

Hufstedler
Judge

I concur:

Aiso,
Presiding Judge

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[48]We have noted the dictum to the contrary in *People v. Bruno* (1962) 211 Cal.App.2d Supp. 855, 863, but we cannot agree with it.

APPENDIX C.

Order Denying Hearing After Judgment by the Court of Appeal, 2nd District, Division 2, Crim. No. 13090.

In the Supreme Court of the State of California, in Bank.

McCoy, *J.*

People v. Weger.

Filed Jul 26 1967, William I. Sullivan, Clerk. By S. F. Deputy.

Respondent's petition for hearing DENIED.

Traynor
Chief Justice

APPENDIX D.

Constitutional Provisions and Statutes Involved.

1. The pertinent provisions of the First Amendment to the United States Constitution are: "Congress shall make no law . . . abridging the freedom of speech, . . ."

2. The pertinent provisions of the Fourth Amendment to the United States Constitution are: "The right of the people to be secure in their persons, . . . against unreasonable searches and seizures, shall not be violated, . . ."

3. The pertinent provisions of the Fifth Amendment to the United States Constitution are: "No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; . . ."

4. The pertinent provisions of the Sixth Amendment to the Constitution of the United States are: "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense."

5. The pertinent provisions of the Ninth Amendment to the Constitution of the United States are: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

6. The pertinent provisions of the Fourteenth Amendment to the Constitution of the United States are: ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

7. The pertinent provisions of California Penal Code Section 647(e) are: "Every person who commits any of the following acts shall be guilty of disorderly conduct, a misdemeanor: ". . . (e) Who loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer so to do, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification." (effective 1961, Cal. Stats. 1961, c. 560, p. 1672).